

Part 1: Nadine Perrault and Erica Hall
Part 2: Christine Lundy
November 2008

Assessing Compliance of National Legislation with International Human Rights Norms and Standards

unite for
children

unicef 

Contents

ASSESSING COMPLIANCE OF NATIONAL LEGISLATION WITH INTERNATIONAL HUMAN RIGHTS NORMS AND STANDARDS	26
<i>Part 1</i> LEGAL TRADITIONS AND SYSTEMS	3
1.1 Introduction to Legal Traditions and Systems.....	3
1.2 Differing Legal Systems.....	5
1.3 Status of International Human Rights Instruments in Domestic Legislation ...	15
1.4 Conclusion	15
<i>Part 2</i> LEGISLATION REVIEW AND REFORM ON BEHALF OF CHILDREN'S RIGHTS	15
2.1 Why Review and Reform Legislation?	15
2.2 Review of Legislation	20
2.3 Reform of Legislation	65
2.4 Conclusion	83

ASSESSING COMPLIANCE OF NATIONAL LEGISLATION WITH INTERNATIONAL HUMAN RIGHTS NORMS AND STANDARDS

This chapter explores the reasons for undertaking a review and possible reform of national legislation relating to children and outlines some of the considerations and approaches that can be used as part of process.

We start with the recognition that legislation is not merely an administrative mechanism which can be altered, withdrawn or introduced with minimal effort. A nation's laws are a significant expression of national character; they define who the people of the country are, what they value and how they relate to each other. Any change to legislation is correlated to a change in the character of the nation. Legislative change may come as a result of an evolution that has taken place in customs and day-to-day usage, or it may serve as a means for creating a new paradigm that seems important for the future and well-being of the country and its population. Of particular interest, in this context, is legislation which is brought into force to protect individuals or groups from discrimination or to promote particular social values.

Legislation of whatever kind necessarily deals with the relationship between the population of the country and its governments, as well as relationships among the people themselves. This is the case whether the legislation deals with the collection of taxes or the prohibition of murder. At the root of most laws are conceptions of human rights, including protection of individuals from physical harm, participation of individuals and groups in society, and provision of opportunities for individual growth and development. Review and reform of

legislation, when undertaken with the explicit intention of respecting, promoting and protecting the human rights of all, is a way for both governments and civil society to have a direct effect on the lives and well-being of all groups within the population.

At the same time, it must be recognized that legislation can be a source of disparities and discrimination. Sometimes this is overt, as with laws that restrict access to certain services or facilities on the basis of age, sex, race, belief or other criteria. Sometimes it is less obvious. The legislation may mandate equal access to health care, for instance, but also require that patients pay for the care they receive, thereby limiting the access for those whose financial resources are extremely limited. Legislation can also condone existing discrimination by not taking active measures to remove the causes of discrimination. If the law does not require all public services to be readily available to people with disabilities, for example, schools may be effectively closed to children with physical handicaps (because they cannot enter the building) or with learning disabilities (because there are no programmes or trained staff to help them learn), or girls may be excluded (because social customs prevent them from attending schools with male teachers).

Reforming existing legislation can be a challenging exercise. Social structures and vested interests which are supported by the legislation as it is currently written and applied may resist change. People may fear the unknown consequences of adopting a different behaviour or policy that is contained within the new legislation. Legislative reform is more than a paper exercise. It can lead to real change in actions, systems and attitudes, at least over time, and the degree of resistance will reflect the importance of that change and the extent to which it affects society's fundamental values. This is nowhere more evident than when it comes to legislation dealing with children and the family.

In undertaking a process of legislative reform in favour of children, it is also important to bear in mind the limitations and the potential benefits of the exercise. As important as law is, there are some things it cannot accomplish. No law, for instance, can force parents to have the best interests of their children as their basic concern (as specified in Article 18 of the CRC). However, legislation can require parents to behave *as if* they did so, by requiring them to provide their children

with the necessities of life and to foster their children's full development.

Legal Traditions and Systems

Our consideration of the process and structure of legal reform in favour of children is based on the recognition of four basic legal systems operating around the world today: civil law, common law, Islamic law, and plural legal systems, which usually involve a civil or common law system combined with, or balanced by, a system of customary or traditional law. The characteristics of each of these systems will be identified, with special reference to their effect on the creation, adoption and enforcement of laws relating to children.

Within each system, there are different roles played by the legislature, the executive of government (including the civil service), the judiciary and the legal system, and representatives of civil society in both the adoption and the implementation of legislation. The different systems are examined in Section 2.2 of this chapter.

Legislative Review and Reform

Every State Party to the CRC is obliged to undertake a comprehensive review of legislation affecting children's rights, to amend or replace legislation which does not meet the State Party's commitments under the Convention and to adopt new legislation as required to fulfil those aspects of children's rights not covered by existing measures. However, each country will approach the process in a way that is compatible with its own political system and legal tradition. Section 2.3 looks at those aspects of the review and reform process which should be common to all.

The processes of review and reform of legislation relating to children are very closely related. A review of legislation is usually inspired by the need or political will to revise, reform or otherwise change an established body of legislation. It will also likely serve as an evaluation of the existing legislation in relation to the legislators' intentions at the time the legislation was adopted and the way in which that legislation has been implemented and enforced since its adoption. It is possible, therefore, for a review to be conducted without it necessarily leading

to legislative reform, since the review may demonstrate that the legislation as it stands is effective and fully in keeping with the rights of children. Reform, on the other hand, should always be preceded by a careful study of the existing legislation and its implementation, as well as the general situation the legislation is meant to address. Only then is it appropriate to take action that will have an effect on the lives of children, their families and their communities. Section 2.3 considers both review and reform in some detail as separate activities, while maintaining the connections between them.

Part 1 LEGAL TRADITIONS AND SYSTEMS

1.1 Introduction to Legal Traditions and Systems

In order to effectively analyse the process and structure of lawmaking and law implementation in a country, one must first understand the country's legal systems. The legal tradition and how this tradition translates into the legal system, as well as local customs and practice, are important factors in understanding the status and application of human rights standards and principles in a given country.

Definitions of the terms 'legal system' and 'legal tradition' may vary. However, in the context of this document, the legal system of a country encompasses its rules and institutions, which are based on its legal tradition; thus, what are being categorized as "systems" (civil, common, Islamic and customary law) are actually the traditions upon which individual countries' systems of law are built.

The legal tradition is the cultural perspective under which the legal system is created, providing the philosophy for how the system should be organized and how law should be formed and implemented. It is based on a historic perception about the role of law in society.¹

¹ These definitions are taken from W. Tetley, 'Mixed jurisdictions: common law v. civil law (codified and un-codified)' *Uniform L. R.*, vol. 4 (1993), p. 591, which cites Merryman, J.H., *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America*, 2nd ed. (1995), p. 1. For further reading, this article is available at: <http://www.unidroit.org/english/publications/review/articles/1999-3.htm>.

It is well accepted that the term 'legal system' encompasses three components: 1) the substance of the law, 2) the structure of the law, and 3) the culture of the law.

1. The substance of the law refers to the letter of the law² (i.e. the formulation of the provisions and clauses) or broad principles of law (which are interpreted by judges, particularly in common law countries).
2. The structure of the law refers to the institutions and enforcement mechanisms put in place to ensure application of the law. These are usually the courts, tribunals, offices of ombudspersons, human rights commissions, etc.
3. The culture of the law refers to the social and cultural contexts in which laws are implemented. These include the social values and practices as well as social differences that may exist within a society.

The legal system has an impact on the ways in which international human rights norms are integrated into national legislation. In general, there are four main ways in which international law can be incorporated into local or domestic law. These are:

1. Through the ratification of or accession to any international agreement, treaty or convention, which automatically results in the provisions of that instrument being incorporated directly into domestic legislation, and being immediately and fully justiciable (i.e. subject to action in a court of law). This is referred to as "automatic incorporation."³
2. Through the promulgation of special enabling legislation, such as a constitutional amendment, a law or decree. Until this is done, the international instrument has no legal force domestically.
3. Through the incorporation of the instrument, in its entirety, in a single piece of legislation.

² This applies specifically to the civil law system.

³ Handbook for Parliamentarians, The Convention on the Elimination of all forms of Discrimination against Women and its Optional Protocol, United Nations and Inter-Parliamentary Union (2003), p. 41.

4. Through the gradual incorporation of various aspects of the international instrument's application over time, using a number of different laws.

The various ways in which international instruments are applied in countries are outlined in detail in the Section of the Handbook entitled "Constitutional reforms in favour of children."⁴

1.2 Differing Legal Systems

This Section looks at homogeneous systems and mixed/plural systems, which are based on countries' legal traditions. Within these two groups (homogeneous and mixed), the traditions considered are those which substantially reflect the legal systems of the States Parties to the CRC. Most countries have some mixture of these traditions, and there are exceptions to the traditions described below. Furthermore, legal traditions are not static or completely distinct, and the below classifications are simplifications. However these traditions do represent the foundation for modern legal systems.

These systems are the civil law, common law, Islamic law and plural or mixed systems with components of customary law. Each system's main characteristics are identified, with special reference to their effect on the domestication of international human rights standards, as well as the drafting, adoption, and enforcement of laws focused on children.

As previously mentioned, there are points of overlap between civil law and common law in practice, and either may be combined with Islamic or customary law in a given country. Even within the broad categories of civil law and common law, there are variations from country to country, so that the basic principles and historical background are adapted and carried forward based on the particular situation of each country. It is from the country's particular expression of the underlying tradition that the system of law is derived.

⁴ For a more comprehensive introduction to the status of international treaties in domestic legislation see Chapter III of this Handbook.

1.2.1 Homogeneous Systems

Many countries have a legal system based on a single legal tradition—either the civil law tradition or the common law tradition. Usually, these countries' systems are described as homogeneous. The principles of the common law and civil law traditions apply whether the legal system in the country is homogeneous or includes the tradition as part of a pluralist system. While the descriptions below focus on the historic concepts of civil and common law systems, the contrast between them is not always sharply defined. Countries with one system increasingly adopt conventions of the other.

1.2.2. Civil Law Tradition

The civil law tradition is derived mainly from Roman law, with its emphasis on writing laws into comprehensive national codes. However, some civil law systems remain un-codified, while at the same time some common law jurisdictions may codify parts of their law (such as a criminal code). Thus, evidence of the systematic arrangement of related laws into a single written document does not automatically identify a civil law system.

The civil law tradition serves as the basis of law in the majority of countries of the world, especially in continental Europe, but also in Quebec (Canada), Louisiana (USA), Japan, Latin America, and most former colonies of continental European countries.

Civil law systems are 'monist' systems, meaning that national and international law are viewed as a single legal system. In general, no separate implementing legislation is needed to enforce the accepted international law. Significantly, the constitutional provisions of most civil law countries legally entitle them to automatic integration of international treaties into domestic law upon ratification – enabling lawyers and judges to invoke them directly in cases brought before the courts.⁵ Therefore, once an international human rights instrument is ratified by such a country, the instrument becomes part of domestic law and prevails over national legislation in the event of a conflict

⁵ UNICEF, *Global Status of Legislative Reform Related to the Convention on the Rights of the Child*. Compiled by Karuna Nundy (2004).

between the two. Usually, the constitution indicates that ratified treaties are to be automatically incorporated in this way, provided they have been published in the *Official Gazette*. In spite of this fact, the practice of directly applying international treaties in courts is limited. Following ratification of the CRC, some civil law countries took the additional step of enacting laws that reflect the treaty's provisions.

In civil law systems, the legislature and judiciary have different roles: the former creates the law and the latter applies the law. Judges are specially trained as such, in training schools or during the post law school practical work period. Judicial decisions are based on interpretation of the written law, and legal scholarship (commentaries by experts, articles by law professors, etc.) may be used to aid this interpretation. Ultimately, judges in lower courts have no legal obligation to follow the interpretations and decisions of other judges in previous cases (except those of the High Court, Supreme Court or *Cour de Cassation*), although they may do so in practice.

In civil law systems, legislators and law professors exert influence over the content of law (its text and its interpretation). Therefore, these two groups are important partners. Additionally, in a monist system, judges can be called upon to apply international human rights treaties to which the country is a party and they should be encouraged to do so.

1.2.3 Common Law Tradition

The common law tradition is derived from the English legal tradition. Historically, common law was law developed by custom (prior practice of justice officials), before there were written laws. This practice has continued to be applied by common law courts, even after laws existed in written form.

In the common law system, court decisions (case law) are an important source of law and expression of legal rules. The courts' interpretation of the constitution, legislation, and codes becomes law itself. Judges create and refine this law through interpretation of community standards and traditions. The decisions of courts thus establish precedent for future interpretation of the law by judges in the same or lower courts within the same jurisdiction. Judges then refine this

interpretation in future cases by extending it to different facts and circumstances.

Statutes, which are laws enacted by the legislature, are written and interpreted by the judges.⁶ Court cases fill the gaps in legislative texts. In many common law countries judges are seen as balancing the power of the other branches of government. Generally, judges do not receive specific training, but are chosen from among respected and experienced advocates/lawyers.

Most countries of the common law tradition apply the 'dualist' system with respect to treaty obligations.⁷ This means that international law is considered a separate system that governs conduct amongst States. It does not acquire domestic status upon ratification unless formal legislative action has been taken. Thus, in common law countries, even if an international instrument such as the CRC or CEDAW has been ratified, specific legislative or administrative measures are required to incorporate its provisions into domestic law. However, in a few common law countries, the CRC and CEDAW have been used by judges in making decisions and have thus influenced case law.⁸ In addition, in many States Parties, legislation incorporating CRC and CEDAW principles and standards has been piecemeal and *ad hoc*.

Another important feature of the common law tradition in relation to lawmaking is that it is traditionally based on *judicial precedent* as opposed to codification of law, the main feature of the civil law system. There is, however, emerging evidence to suggest the adoption of some civil law features into the common law tradition and vice-versa: Whereas in civil law countries, there is a growing importance of judicial review in the lawmaking process, in common law countries, there also appears to be an adaptation towards statute law and codes.

⁶ Statutes are often written to be interpreted and can therefore be rather general in their phrasing. Unless the laws are very specific in their wording, they can be interpreted quite broadly, depending on the rights and interests involved.

⁷ While most common law countries are dualist when it comes to international treaties, this is not because of the common law. Rather, it is the result of the application of the royal prerogative in ratification of international treaties.

⁸ The CRC is a key component of the definitive Canadian reference on all law affecting children (*Wilson on Children and the Law*).

In the common law tradition, the understanding of human rights (generally preserved in the national constitution or a bill or charter of rights) may be redefined or expanded through interpretation by the courts, as judicial decisions establish legal precedents which have the force of law in common law countries. Thus, courts and judges are important partners in broadly defining children’s rights in systems based on common law traditions. Judges must be seen as potential advocates for advancing the realisation of children’s rights. Similarly, legislators should be encouraged to pass legislation holistically incorporating the CRC and CEDAW domestically. Doing so will make it easier for parties to court cases to invoke the CRC or CEDAW in support of their cases. In the absence of holistic incorporation, advocates/lawyers should encourage courts to use the CRC and CEDAW (even when not ratified by the State)⁹ as a persuasive authority—based on the State’s voluntary acceptance of obligations in ratifying the instrument.

1.2.4 Mixed/Pluralist Legal Systems

Mixed or pluralist legal systems are the most complex to navigate and analyze in terms of how best to support legislative reform for children and women. They may involve combinations of any legal traditions and often include some form of customary or traditional law. In other cases, pluralist countries combine civil or common law with Islamic law. The different traditions may interact or operate in independent spheres. Pluralist countries pose the distinct problem of trying to balance the different legal approaches of multiple systems operating at the same time.

1.2.5 Islamic Law

Islam provides rules for both religious and secular life, setting an extensive code that directs how the faithful must behave as a community.

Islamic law is based upon the principles of *Shari’a*, which “refers to the general normative system of Islam as historically understood and

⁹ *Attorney-General of Botswana v. Unity Dow*, 1992 LRC (Const) 623, decided by the Court of Appeal of Botswana.

developed by Muslim jurists.”¹⁰ For purposes of this Handbook, States Parties of the Islamic legal tradition may be described as those whose civil and penal laws are predominantly based on *Shari’a*. The *Shari’a* covers a wide range of issues, from diet, the use of public space, and child custody to criminal punishment. Islamic law is based predominantly on the *Qur’an*, *Hadith* or *Sunna* (custom or conduct of the Prophet Mohammed), *Ijma* (consensus among or opinion of Muslim jurists on a question of law), *Qiyas* (analogical deduction, in matters not covered by the other sources) and *Ijtihad* (exercising independent juristic reasoning). The *Shari’a* took somewhat different forms within these approaches, and its content and methods vary across the Muslim world today depending on prevailing approaches in each region and country, and the local customs that informed them.¹¹

Most Muslim countries have incorporated the *Shari’a* into their domestic law, to one degree or another. Constitutions of Islamic States also serve as useful frameworks for determining the status of international law within the legal framework. The constitutions of many States provide that the *Shari’a* shall be the principle source of legislation.

In many States secular and religious laws co-exist where public law is conducted on the basis of secular principles. It is the *Shari’a* on personal status matters – such as marriage, polygamy, divorce, repudiation, custody and guardianship of children, sexual relations and inheritance – that is most frequently found in legislation. This is primarily because the *Qur’an* and *Sunna* give their most detailed prescriptions on these matters, because Islamic personal status laws were often left largely intact during periods of colonial rule, and because Islamic fundamentalist movements typically make this area of law a main focus in their reforms.¹² Furthermore, there are countries

¹⁰ A. An-Naim, ed., *Islamic Family Law in a Changing World: A Global Resource Book*, Zed Books, London (2003), p. 1, as cited in S. S. Ali, ‘A Comparative Perspective of the Convention on the Rights of the Child and the Principles of Islamic Law’, in *Protecting the World’s Children: Impact of the UN Convention on the Rights of the Child in Diverse Legal Systems*, UNICEF, Cambridge University Press: New York (2007).

¹¹ See: Dwyer p. 2,12; Venkatraman p.1964-1970; Elahi p. 368-369; An-Naim, “Religious Human Rights” p. 342-343.

¹² Lee, Waldorf, *Children’s Rights and Islam*, UNICEF unpublished Working Paper (2000).

whose populations belong to different faiths¹³ that have enacted personal status laws specific to each of the dominant religions.¹⁴

Local variation also plays an important role in Islam. Not only were regional traditions influential in the development of the *Shari'a*, but religion as it is now explained and understood at the local level does not always conform to the letter of the *Qur'an*. Some customary practices may be falsely characterised as Islamic. Also, it should be noted that local custom informed the development of the different Islamic schools of law. As a result, the conflicts which may exist between children's human rights and what is understood to be a proper Islamic way of life are not consistent across the Muslim world.

Therefore, particularly in the area of family law, there is some belief that a reformulation of practices relating to custody, guardianship, marriage age, and inheritance rights, among others, is possible within the framework of Islamic law.¹⁵ For instance, some Islamic States have used *ijtihad*, or the evolving interpretation of Islamic religious texts, to change attitudes.¹⁶ Highlighting the provisions of Islamic law that are conducive to children's rights can advance implementation of the CRC and CEDAW.

1.2.6 Traditional or Customary Law

Political and historical linkages between a number of countries in Asia, Africa and parts of Oceania,¹⁷ and those of the purely civil law and common law traditions (particularly France, Britain, Belgium and Portugal), resulted in the emergence of mixed legal traditions. Mention can also be made of the Anglo-Dutch system of law, which affected countries in southern Africa. The pre-existence of customary law or *Shari'a* (or both) in colonised States and the subsequent positioning of civil law, common law or Anglo-Dutch systems made this possible and persisted even after these States gained political independence.

¹³ Countries such as India and Sri Lanka.

¹⁴ See: Syed p. 372-374; Venkatraman p. 1972-4; Goonesekere p. 49-53; Lucas p. 54-55.

¹⁵ S. S. Ali, 'A Comparative Perspective of the Convention on the Rights of the Child and the Principles of Islamic Law', in *Protecting the World's Children: Impact of the UN Convention on the Rights of the Child in Diverse Legal Systems*, UNICEF, Cambridge University Press: New York (2007), citing various scholars of Islamic law.

¹⁶ A/52/38/Rev.1, paras 45-80.

¹⁷ UNICEF study, *supra*.

This historical process has had a profound effect on the legislative agenda of affected States Parties. Colonisation generally resulted in the introduction of new laws, principally founded on the ideals of the colonising State. In addition, traditions and customs continue to play a significant role in the legal system of many countries. States in which traditional law has a significant impact often officially recognize certain customary provisions as sources of law and define the place of these provisions in the hierarchy of laws. In Fiji, for example, common law and customary law operate within the same system. State law is based on the common law tradition, while both indigenous Fijians and Indians have their own distinct customary law traditions. Fiji has thus integrated the customary law into both its constitution and statutory law.¹⁸

Customary law, in some cases administered by traditional chiefs and their councils, often deals with matters relating to children and family. Even if the written laws of a country protect and promote children's and women's rights, traditional practices may often hinder their effectiveness. For example, the law may grant women the right to inherit property (from a husband or father who dies), but if a woman is not aware of the law or if customs in her community exclude women from inheriting property, she may not be able to benefit from the law.¹⁹ In the case of Ghana, the national constitution specifically protects women's equal right to inheritance, but many women are unaware of the law.²⁰

Often, the plurality of sources of laws in countries with mixed legal systems places them at a disadvantage with respect to standards expected under article 4 of the CRC in general, in particular the obligation to undertake legislative reform. Countries with diverse legacies usually face additional hurdles in ensuring that the legacies of

¹⁸ Phillips, Gwen, 'Application of Customary Law Rules in Fiji and the Pacific Region: Dual Systems', in *Bringing International Human Rights Law Home: Judicial Colloquium on the Domestic Application of the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child* (2000), p. 122.

¹⁹ See UNICEF, *Human rights for children and women: How UNICEF helps make them a reality*, p. 19-20; Centre on Housing Rights and Evictions, *Bringing Equality Home: Promoting and Protecting the Inheritance Rights of Women* (2004).

²⁰ Centre on Housing Rights and Evictions, *Bringing Equality Home: Promoting and Protecting the Inheritance Rights of Women* (2004), p. 178.

colonial, customary and *Shari'a* laws are consistent with the principles and provisions of the CRC.

Box 14: Main characteristics of key legal systems

Civil Law System

- This written law is the primary source of law and is organized into comprehensive codes, which lay out basic legal principles (rule oriented system); codes are written in general language.
- Judges apply law and use legal scholarship as a source for interpretation of the law; interpretation looks at legislative history, doctrine, the law's purpose.
- Judges have no legal obligation to follow the interpretations and decisions of other judges in previous cases (except those of the High Court or Cour de Cassation), although they may do so in practice.
- The judicial decision process begins with identifying the applicable principle and then applying it to case.
- Focus is on social order and timely resolution of cases; consistency of interpretation is often considered less important.
- Judges are specially trained as judges (in training schools or during the post law school practical work period).
- Laws are published in an Official Gazette; once ratified, international treaties will become part of domestic law when they are published in the Official Gazette.

Common Law System

- Court decisions (case law) are an important source of law.
- Legislation is generally specific and interpreted by judges.
- The judiciary provides a check on the other branches; court decisions are laws in and of themselves.
- Judges look to previous cases in their jurisdiction to decide a case (law is based on what has been decided before).
- Court decisions are very 'fact specific' (i.e. on interpretations of the facts to see what rule should be applied and how).
- Court decisions may create the impetus for legislative reform to fill gaps in legislation exposed by cases.

Islamic Law

- The system is based on religious sources of law and juristic techniques: the *Quran*, *Hadith* or *Sunna* (custom or conduct of the Prophet Mohammed), *Ijma* (consensus or opinion, agreement among Muslim jurists on a question of law), *Qiyas* (analogical deduction, in matters not covered by the other sources) and *Ijtihad* (exercising independent juristic reasoning).
- Islamic law most often coexists with customary norms and/or 'secular' legal frameworks (in a pluralist system).
- Personal status law or family law is the area most commonly covered by Islamic law in pluralist systems.

Traditional/Customary Law

- This refers to oral law based on inherited custom and community tradition.
- These laws often prevail in practice even when at odds with formal written laws.
- Traditional law is sometimes adjudicated by traditional leaders or tribal councils.

1.3 Status of International Human Rights Instruments in Domestic Legislation

The position of international human rights instruments, such as the CRC and CEDAW, varies with the legal systems and constitutional structures of different countries. For some, the ratification of or accession to any international agreement, treaty or convention automatically results in the provisions of that instrument being incorporated directly into domestic legislation, and being immediately and fully justiciable (subject to action in a court of law). For others, the international instrument has no legal force domestically unless and until special enabling legislation is adopted. In some cases, this may be done through a constitutional amendment. Other countries may choose to incorporate the instrument, in its entirety, in a single piece of legislation. Still others will use a number of different laws, dealing with the various aspects of the instrument's application, to incorporate it gradually over time.

The various ways in which international instruments are applied in countries are outlined in detail in the Section on constitutional changes.

1.4 Conclusion

The legal traditions in a given country can have a profound impact on how international human rights treaties such as the CRC and CEDAW are implemented. The legal system also has an effect on how stakeholders can advocate for and support legislative reform (through institutional mobilization, monitoring of resource allocations, and policy and law implementation, for example). Understanding the foundations of the legal tradition in a theoretical sense²¹ can provide a

²¹ For a more comprehensive introduction to legal traditions, see M.A. Glendon, et al., *Comparative Legal Traditions in a Nutshell* (2d. ed., 1999); I. Edge, ed., *Islamic Law and Legal Theory*, Aldershot: Dartmouth (1996).

better understanding of the national system, how it works, and how it can foster the realisation of children's and women's rights.

The general principles of human rights (universality, indivisibility and interdependency)²² collectively connote the need to maintain cohesion in the law reform process.

Part 2 LEGISLATION REVIEW AND REFORM ON BEHALF OF CHILDREN'S RIGHTS

2.1 Why Review and Reform Legislation?

There are several reasons why a country would undertake to review and reform its legislation relating to children. In some places, several factors may combine to prompt an examination of legislation, social policy, administrative structures and the allocation of resources that reflect a State's effort to meet its obligations to its children. The reasons for undertaking the exercise will, to a large extent, determine the process followed and the resulting actions.

One reason for review and reform of legislation could be to ensure that the State Party is meeting its commitment under Article 4 of the CRC to "undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention." There may, in addition, be a similar obligation in relation to CEDAW or other related international instruments to which the country is a party. For some, a review of legislation could be sparked, as it was in Ghana, by the preparation of a report to the Committee on the Rights of the Child.²³ The Committee's Guidelines for the preparation of reports ask explicit and precise questions about steps taken to implement the provisions of the CRC in national

²² See <http://www.unicef.org/CRC/> for more details on the general principles of human rights.

²³ Quashigah, Kofi, *Legislative Reform Initiatives, Institutional Development and Policy Changes in Favour of Children: A Ghana National Study*, Accra, UNICEF Ghana (date unknown) [henceforth: Ghana], p. 13.

legislation, including specific laws, budgetary measures, administrative mechanisms and policies regarding children.²⁴

The review and reform process could be part of a broader national examination of the situation of children. This may be driven by public concerns about child poverty, health, education, nutrition, labour or exploitation. These issues may be brought to public and government attention by children, or by their advocates. The government may take the initiative, in response to either a political decision or (in common law countries) judicial findings that bring existing laws or parts thereof into question. The media, by bringing breaches of children's rights to public attention, can be instrumental in generating concern that can lead to review and reform of legislation.

A dramatic change in the political landscape, such as the end of Apartheid in South Africa,²⁵ can provoke a wide-ranging review and reform of national legislation, including the constitution. This would naturally also include legislation relating to children's rights as a matter of course. In monist countries, for which the CRC became enforceable in law as a direct result of ratification or accession, there is still a need to ensure that other, pre-existing legislation is in harmony with the provisions of the CRC. If legislation is not in accord with the CRC, the State is obliged to take the steps necessary to rectify the situation, so as to avoid contradictions between the CRC and the legislation. This has been the case, for example, in countries such as Nicaragua, Ethiopia, Syria and Belgium.²⁶

For dualist countries, such as Jamaica, Ghana and India,²⁷ which do not automatically adopt international instruments into national law, the existing legislation needs to be reviewed to see the extent to which it fulfils the State's obligations under the CRC. If there are gaps or contradictions, new legislation needs to be adopted to establish the full legal implementation of the CRC's provisions in the country's courts

²⁴ Hodgkin, Rachel and Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child*, Fully Revised Edition, UNICEF, New York and Geneva (2002) [henceforth: *Implementation Handbook*], p. 54-5.

²⁵ Nundy, Karuna, *Global Status of Legislative Reform Related to the Convention on the Rights of the Child*, Global Policy Section, UNICEF (internal paper), New York (April 14, 2004) [henceforth: Nundy], p. 13.

²⁶ Nundy, p. 8-9 (footnote).

²⁷ Nundy, p. 6-7 and p. 10 (footnotes).

and to promote the full implementation of children's rights in government policy, programmes and operations.

There is a distinct difference between a process of legislation review on behalf of children that arises from a broadly held desire on the part of society to foster a protective, nurturing or egalitarian environment in which children can grow and develop, and a process that is undertaken in order to ensure compliance with CRC/CEDAW.

If the review is the result of a general commitment on the part of the government and civil society to promoting the broadest possible wellbeing of children, it will naturally look at an extensive range of legislation. Legislation that affects children, and which needs to be harmonised with the CRC and CEDAW, goes well beyond laws that specifically mention or pertain to children. This approach will likely also entail a stronger and more expansive understanding of the role of society as whole, and the administrative structures of the State in particular, in supporting and protecting children's rights. However, such an exercise can become vague and unfocused if it tries to take on every aspect of children's lives all at once.

On the other hand, while a review of legislation in response to CRC/CEDAW avoids digression and keeps a clear focus on its objective, it may be seen as a purely technical exercise for government agencies. As such it may lack the kind of public support that enables ready acceptance of the principles of children's rights and, eventually, support for any

Legislative measures

- Specific laws and regulations;
- Creation of specific institutions to promote and protect the rights of children;
- Processes within existing broader institutions to take account of the interests of children; and
- Government policies, plans and programmes, including goals set for economic, social and cultural rights of children, such as:
 - education (e.g. school enrolment and completion targets);
 - health care (e.g. immunisation coverage); and
 - nutrition (e.g. access to adequate and appropriate food and nutrition).

Legislation dealing with children's rights:

- Includes:
 - protection from abuse and exploitation;
 - administration of justice;
 - provision of services (education, health care, nutrition, housing and economic support);
 - assignment of family responsibilities; and
 - creation of opportunities for children to participate in national life;
- Establishes basic principles that underlie all relations between the State and its children;
- Creates structures, processes and systems through which those relations are carried out;
- Provides for necessary administrative and budgetary resources to implement measures adopted and to maintain institutions created to promote and protect children's rights; and
- Establishes standards and mechanisms for monitoring the situation of children's rights in general, not only in relation to specific pieces of legislation.

resulting change to accustomed practices. It could result in a situation in which children's rights are formally recognised in law but are not respected in practice, if both political will and popular acceptance are missing. Concentration on the specific provisions of CRC/CEDAW could result in failure to take account of some measures which have a significant if indirect effect on children's rights. It is important with this approach as well to recognise that the legislation to be examined is not limited to specific laws which deal explicitly with children. Since just about any action of government will have some effect on the lives and rights of children, all legislation needs to be taken into account in assessing the implementation of the CRC and CEDAW.

2.1.1 Children's Rights and National Legislation

The CRC serves not only as an international standard for the treatment of children, but also as a symbol of the new and growing understanding of the position of children in society. Once it was assumed everywhere that children were essentially objects of protection or objects of control, the exclusive responsibility of the family and not fully persons in the legal sense. The CRC embodies the recognition that children are subjects of rights and fully entitled to participate in society to the extent their developing capacities allow.

All legislation relating to children, including but not limited to family law and those measures that deal with criminal activity both by and against children, needs to be reviewed and, if necessary, amended in the light of this new understanding.

Crucial to this is the acknowledgement that children are important members of society and that society, therefore, has a responsibility to care for them and promote their fullest possible development. A particular example of the sort of attitude that needs to be overcome is found in the "doctrine of irregular situation" which was, for years, at the root of much legislation dealing with children in Latin American countries. This concept held that children "are objects of judicial protection rather than individuals with rights."²⁸ It left children who were not subject to legal intervention, for example children who live in households with either their families or as domestic employees, subject to a wide variety of abuses without legal recourse, while the judicial process and the treatment of children who come to the attention of the courts, including in cases of institutional care and detention, did not "make a clear difference between children in need of care and protection and those in conflict with the law."²⁹

Legislation affecting children does more than set out rules for behaviour with regard to children. Although it is important that the law define prohibited acts committed either against or by children, and set out the penalties that will be imposed for those acts, the scope of legislation in relation to children, especially as envisaged by the CRC, is much broader. It encompasses all aspects of a child's life and the child's relationship to others.

This may seem a very broad definition of legislation as it relates to children. However, legislation is the primary means by which governments act on behalf of the State to manage their many responsibilities, including responsibilities to and for children. When considering review and reform of legislation in relation to children's rights, legislation specifically dealing with children – family law, juvenile justice, laws about education or against child labour, laws to protect children from sexual exploitation – is not the only realm of law

²⁸ Nundy, p. 9.

²⁹ Nundy, p. 9.

that must be taken into account. Other pieces of legislation, including those that deal with matters of gender equality between men and women, as well as between boys and girls, should also be considered, since children, as members of society, are affected by all legislative action.

2.2 Review of Legislation

2.2.1 Approaches to Review

The precise nature of the legislation in place will vary from country to country, depending on the legal system, the political process, economic circumstances, traditional values and the role of the State in social matters. In particular, the mechanisms for monitoring children's rights, both in law and in practice, will reflect the ways in which a country manages the relationship between the State and the population in general. However, there are certain fundamental concepts and approaches that should be common to all States Parties to the CRC and to CEDAW, which will be highlighted throughout this chapter of the Handbook and those that follow.

The following discussion deals primarily with the incorporation of the provisions and principles of the CRC and CEDAW into legislation. In those countries which follow the common law tradition, the review should go beyond written legislation to the body of jurisprudence and case law that has a bearing on children's rights. The processes examined here can be applied to both written and unwritten law.

This guidance has implications, as well, for countries with plural legal systems that include customary law. Because customary law is largely unwritten and dependent on interpretation, an analysis of the situation of children's rights and possible revision of customary law will have to be approached with great sensitivity, taking into account both cultural and historical aspects of the customary law. It should be done in a way that is responsive to the characteristics of each community and cultural group. In many plural legal systems, customary law is constitutionally deemed subservient to the state standard of civil or common law. In all circumstances, because of the universality principle that underlies all United Nations human rights instruments, rights take priority over

custom in determining what laws, rules, regulations and traditional behaviours are acceptable. Therefore, it should be possible also to reform customary law as it relates to children's rights by means of legislation if necessary. Given this understanding, a review of customary law as it affects children's rights can be undertaken using the processes described below.

Similarly, review and reform of legislation that derives from Islamic law involves more than the relationship between written law and the provisions of the CRC and CEDAW. The crucial religious and historical dimension of Islamic law requires an approach that takes into account more than written jurisprudence, considering, for example, the role of religious leaders and teachers. Even in countries where Islamic law prevails, however, it should be possible to consider the approaches and objectives of review and reform of legislation as described here.

The Committee on the Rights of the Child, in its evaluation of State Party reports on the implementation of the CRC, has consistently stressed the need for all States to examine their own legislation to see if, and to what extent, it is in compliance with the provisions of the CRC. For example, in its Concluding Observations on the Initial Report of Indonesia, the Committee said:

“The Committee recommends to States Parties that they set up a mechanism to ensure that all proposed and existing legislative and administrative measures are systematically reviewed to ensure the compatibility with the Convention on the Rights of the Child. Such reviews should be carried out considering all the provisions of the Convention, and be guided by its general principles; they should also give adequate attention to the need to ensure appropriate consultation with and involvement of civil society during the review process.”
*(Report on the twenty-second session, September/October 1999, CRC/C/90, para 291(f).)*³⁰

³⁰ Implementation Handbook, p. 59.

2.2.2 *Who Participates in the Review?*

A review of legislation that affects the rights of children has two equally important dimensions: analysis and consultation. These are not separate and unrelated. As the example of Venezuela's legislation reform process³¹ shows, the interaction of technical assessment with public consultation can produce the most effective result with the broadest possible public support.

Throughout, the review process should involve the full range of parties who have an interest in the situation of children and their rights. As the principal organ of the State, responsible for both developing and implementing legislation, the government naturally has a key role to play at all stages of the review. To be effective, the review will need to engage all organs of government, both political and administrative. The commitment of government to the process, and their full acceptance of the results, will be critical to the success of this endeavour.

At the same time, the review process needs to go well beyond the formal governmental structure. It should engage all sectors of the country, covering as many representatives of different stakeholders as possible. It is especially important to involve groups which may be marginalized or disenfranchised from normal centres of authority and decision-making within the country. This would normally include women, geographically isolated groups and minorities of any kind.

The full scope of the legislation review process described below, including both analysis and broad-based public consultation, may not be within the capacity of all countries. Limited resources, lack of suitable civil society partners for government to work with, logistical problems that prevent reaching out to people where they live throughout the country are all factors that can affect the ability of those conducting the review to be as thorough as they would like. Even with these limitations, however, it should still be possible to undertake a review of legislation which will examine all relevant measures (legislation, policies, administrative structures, budgetary provisions)

³¹ Garate, Gorka, *Los Procesos de Construcción de una Nueva Legalidad para Niños y Adolescentes: Tres Experiencias: Venezuela, Guatemala y Costa Rica*, UNICEF El Salvador (internal paper), San Salvador (September 2005) [henceforth: Garate], p. 14-35.

from the perspective of children's rights. The methods may vary, but the questions asked can be the same, and, even if the range of people consulted is not as broad as the entire population, there are always ways to involve representatives of civil society and children themselves in the exercise.

Although the specific details of the review process will vary depending on the nature of the political and legal system in each country, there are several basic elements that will form part of a successful review process. These are:

1. Analysis of the existing legislation in relation to both the provisions of the CRC/CEDAW and the situation of children in the country concerned, including issues such as gender parity, economic status and geographic limitations;
2. Consultation with the widest possible range of people, institutions and groups interested in legislation that affects the rights of children; and
3. Development and presentation of conclusions and recommendations for further action.

The analysis and consultation elements of the review process are equally important and require the same level of commitment and preparation to ensure a successful review. When executed thoroughly, the process will lead to greater understanding of children's rights and effective legislation which fully respects, protects and promotes those rights.

1. Analysis

Legislation is a specialised means for defining and implementing government policies, plans and programmes as well as a mechanism for regulating and managing relationships and actions within the broader society. Because it has legal force and is subject to testing in a court of law, it is written in a precise and carefully nuanced language that is sometimes quite different from common usage of words in day-to-day discourse. Therefore, the analysis of legislation is a task generally delegated to those with expertise in the field.

This does not necessarily mean it can only be done by lawyers, however. Expertise in the subjects dealt with by provisions of CRC/CEDAW, especially those that address the broader society's responsibility to children, can best be found among those who work with children on a daily basis or whose experience lies with the practical effects of the legislation's implementation on children's lives. Thus, in addition to those who have specialised knowledge and experience with the technical aspects of drafting and implementing legislation (which may include representatives of the legal system), the analysis of legislation in relation to the rights of children should also involve child care experts, health workers who deal with children, educators, children's rights advocates and any others who have specialised knowledge of the issues to be considered. Depending on the legislation being considered, the review could be conducted by teams of experts drawn from government and non-governmental organisations, with different teams analysing the categories of legislation that relate most closely to their areas of expertise.

The technical analysis of legislation should take into account not only the extent to which the legislation in question gives effect on paper to the specific provisions of CRC/CEDAW but also the ways in which that legislation directly and indirectly affects the actual situation of children and their rights every day. This means going beyond merely assessing the text of a law to examining how it is applied by the courts and the civil authorities responsible for implementing it and understanding how it is viewed by the people it directly affects, especially children and their families.

The analysis can be led by a single body with a broad range of expertise, such as the Child Law Reform Advisory Committee established by the Ghana National Commission on Children.³² A similar approach was used in Uganda, with the Ugandan Child Law Review Committee, and Madagascar, with its Commission for the Reform of the Rights of the Child.³³ Such a diverse group brings to bear different viewpoints and backgrounds which will enrich the discussion and provide insights that may expand both the committee's understanding of the total effect of the legislation on the lives of

³² Ghana, p. 13.

³³ African Child Policy Forum, *Harmonisation of Laws Relating to Children in East and Southern Africa: A Summary Report*, 2006 (draft), p. 17.

children and the range of recommendations the committee can bring forward.

Some countries have permanent legal commissions which regularly review all legislation and make recommendations for reform as necessary; in some countries, this role is performed by a specially designated Law Reform Commission. The Law Reform Commissions of Kenya, Lesotho and South Africa undertook such reviews of legislation.³⁴ For a specific review of legislation relating to children's rights, such a general commission could be augmented by specialists in matters of concern to children.

It has been the case in the past that reviews of legislation in some countries have taken a more restricted approach. This has usually involved hiring a small team of legal experts (or sometimes just one lawyer or judge) as consultants to undertake an assessment of the laws relating to children in close comparison with the provisions of CRC and CEDAW (if the latter is relevant). This approach has several inadequacies. Although the consultants engaged may have extensive legal knowledge in the specific areas covered by the legislation studied, they often lack experience in the actual implementation of the legislation and knowledge of the situation of children in regard to that subject area (health, education, nutrition, employment, abuse, etc.). As a consequence, their review of the legislation tends not to be as complete as it might be with a more broad-based group of experts. There is also the risk that, with such a narrowly based approach, the personal ideas and expectations of the consultants may bias the assessment in some direction, because they would lack the wider perspective of a more heterogeneous review panel. As a bonus, expanding the range of people involved in the analysis can be seen as an illustration of the right to participation.

The analysis of legislation, with its supporting information, can be used by the experts' group to formulate recommendations for further action. But, before a final decision is made, it is important that the conclusions of the review are fully owned by the people who will have to take responsibility for the necessary follow-up: This includes not only the government, but also civil society and the public in general.

³⁴ Ibid, p. 17.

For the government to fully own the review process, from the beginning, representatives of key ministries should be involved in the analysis of existing legislation and in formulating any recommendations about changes that may be needed, including decisions about budgetary and administrative resources to support the implementation of existing legislation and any new measures that may be proposed. The processes followed in Ghana, Jamaica³⁵ and Venezuela are all good examples of the engagement of government Ministries and agencies from the beginning. In Venezuela, the role of the Special Congressional Commission was crucial in focusing political attention on the legislation, while the involvement of the National Institute for Children (INAM) ensured government commitment to the implementation of the conclusions of the process.³⁶ Ghana's engagement of various government ministries, departments and agencies also established a solid basis for continued government support of the results.

2. Consultation

The technical analysis, however, is only part of the work that needs to be done for a thorough review. In order to understand the real effect of the existing legislation and the ways in which the legislation relates to the real situation of children, it is important to undertake a consultation that will involve as many segments of civil society as possible. This will be important not only for any corrective action that may result, but also for the effective application of existing legislation and new measures that may be adopted as a result of recommendations arising from the review. This is particularly important in countries with plural legal systems that incorporate customary law. As a general rule, the broader the participation throughout the review process, the greater the likelihood of public support for any legislation that promotes, protects and respects children's rights.

The possible range of participants in the consultative phase of the review process is extensive. Consultation should engage as many

³⁵ UNICEF Jamaica, *Advancing Children's Rights in Jamaica: Report on Legislative Reform Initiative*, UNICEF Jamaica, Kingston (August 2004) [henceforth: Jamaica].

³⁶ See Garate, p. 14-35.

different points of view as possible, to ensure the widest possible perspective on the ways in which the legislation under consideration affects the lives of children and women.

It is important to engage the people who work with the legislation and its effects on a day-to-day basis. These can include teachers, health workers, social service workers, correctional staff, the staff of government-operated recreational and cultural institutions, administrators and managers, including the government staff working in areas such as social workers and employees of civil registries. Depending on the subject matter, this category may also include the judges and lawyers who consider the legislation in court or in mediation.

Since the specific provisions of the legislation may be implemented at lower levels of government (state/provincial, district and municipal) the representatives of those levels of government should be given a full opportunity to present their opinions and experiences. Traditional or tribal leaders should be able to offer their own experience as a counterpoint to the formal government system, especially in countries in which customary law plays an important role. Civil society, as represented by organisations that work with children and women and/or human rights issues, has an important contribution to make in any review of legislation dealing with children and affecting the rights of children and women.

Who to Consult

- Technical Staff
- Judges
- Lawyers in the field
- Politicians (all parties)
- Other levels of government
- Traditional Leaders
- Children's NGOs
- Women's NGOs
- Human rights agencies
- Religious Leaders
- Academics
- Media
- Community Organisations
- Families
- Children

Other potentially helpful participants in the consultation include religious leaders, academics, the private sector (business leaders) and the media, not only for the influence they have on the opinions and actions of the general population but also because they will have valuable insights into the basis for specific measures dealing with children and the social context in which the legislation operates.

Parents and other family members who have experience with the operation of the legislation and the effects it has on family life and the well-being of children should be

given the fullest possible opportunity to express their views and make their recommendations.

Last, but far from least, children themselves should be actively engaged in the review process, since they are the ones most immediately and directly affected by the legislation being considered. The participation of children is discussed in more detail in paragraphs 49 to 56 below.

Of course, not all of these groups will participate at all stages or to the same degree, but it is necessary that they are all involved in a real and not token fashion if the review of legislation in relation to children's rights is to have any positive effect in terms of generally accepted practices and the ways that various entities of government and society deal with children.

2.2.3 Public Participation

As the first step in the consultation aspect of the legislation review process, the assessments of the technical teams and their analysis of legislation that has led to those assessments should be made available to as wide a public as possible, so that they can learn what is needed for children and what their government could deliver through legislation.

Public Participation

1. Disseminate analysis as widely as possible.
2. Provide opportunities for public debate.
3. Educate public about children's rights.
4. Integrate public contributions into overall review process.

This could be done by preparing a summary report, written in easily accessible language, which would then be distributed in much the same way as the country reports to the Committee on the Rights of the Child are distributed. Copies could be sent to:

- libraries,
- all interested organisations both governmental and non-governmental,
- religious bodies (especially important in countries with Islamic law),
- academic institutions,
- the media for wider distribution, and

- groups with a particular interest in the findings of the technical analysis, including members of the legal profession, child care workers and their agencies, and other levels of government which may have responsibility for actions on behalf of children.

The widest possible publication of the results of the technical analysis will serve to promote a broad-based public discussion of the implications of the analysis, and of children's rights in general. Ideally, and especially if any changes in legislation are required to enhance compliance with the CRC and CEDAW, the discussion will lead to broad-based public support for legal measures in favour of children's rights.

The public consultation process could be led by a government agency or special task force, or by a mixed government/non-governmental committee or coalition, or it could be led by a completely non-governmental body established to promote children's rights. For example, in Jamaica, public involvement in reviewing existing legislation and lobbying for changes was sparked by the Jamaica Coalition on the Rights of Children (JCRC), a coalition of several non-governmental organisations which was originally established to promote ratification of the CRC and which now operates to encourage measures to put the CRC's provisions into practice.

After conducting their own analysis of existing legislation, employing a legal expert, the JCRC conducted an intensive campaign to bring the issues of children's rights and the need for improved child protection legislation to the attention of politicians and the general public. The methods used included:

- lobbying,
- letter-writing,
- providing information to the media,
- participating in radio programmes,
- holding educational workshops, and
- coordinating with the outreach efforts of various organisations interested in the welfare of children.³⁷

³⁷ Jamaica, p. 18.

Although a broadly representative consultative process may be complex and complicated to organize and manage, it has the advantage of diluting the impact on the process (and on any new legislation that may result) of individual prejudices, preconceptions and priorities that might easily distort a more narrowly-based review. The more diverse the participation in the process, the more objective the resulting conclusions are likely to be. A broad-based process will allow divergent points of view to be expressed as constructively as possible, as part of an effort to develop a national consensus.

2.2.4 Public Consultation and Education

Where legislation, traditional practice and the principles of children's rights take distinctly different approaches to the treatment of children and their position in society, those differences are bound to be reflected in the discussions and debates that develop through consultation with the various groups. It is important that these different views be given their due attention; Everyone has a right to be heard. It is also important that the focus of the consultation on the rights of children not be lost, whatever other claims (for example, the "rights" of parents) may be raised.

The mere idea that children have rights, much less the nature of those rights, can create a great deal of controversy in most societies and cultures. There has been and will continue to be some resistance in many places to the idea of children's rights and, by extension, to any legislation that may exist or be proposed to fulfil those rights. No matter how complete and comprehensive legislation may be with respect to children's rights, there can be no effective implementation unless there is at least a general agreement on the part of a significant segment of the population that the rights of children are valid and should be respected.

Much of the apprehension caused by the idea of children's rights can be attributed to lack of knowledge or understanding of the principles behind the CRC and the specific provisions which are to be reflected in national legislation. The legislation review process, therefore, provides a good opportunity to educate members of the public, and members of the various interest groups that have a stake in greater recognition of and respect for children's rights, in the basic tenets of the CRC and

CEDAW and the ways in which those principles can and should be put into practice in their country.

This education can be integrated with the discussion of specific laws, to enable people to see how rights are not merely abstract concepts but the essential foundation on which practical action on behalf of children and their families is based. By connecting the discussion of rights to an assessment of the effect of actual laws on the lives of children, the people who are most directly involved in dealing with children –and who, by extension, have the most immediate influence on the way in which their rights are addressed – can see how the idea of rights for children is translated into real improvements in the way children are treated.

Some of the most important beneficiaries of this education will be the government officials, members of the judiciary and law enforcement officials who are responsible for the effect their adoption and enforcement of legislation have on children and families. By making a connection between the CRC/CEDAW and not only national laws, but also accepted standards of practice (for example in the treatment of children who come into contact with the justice system), these officials may be able to adapt the way they deal with children to respect the rights of those children. If the consultation leads to support for necessary changes in the way that legislation which affects children and their rights is implemented, even without specific changes to that legislation, this will have been an effective and worthwhile endeavour.

2.2.5 Children's Participation in Review of Legislation

In Jamaica, children themselves were involved in the public consultation on the new Child Care and Protection Act through island-wide workshops, where valuable contributions to the final bill were made.³⁸ The inclusion of children in the legislation review process is intended not merely to provide opportunities for media coverage and platitudes. If the process of reviewing legislation is to be an effective means for assessing the implementation of the provisions of the Convention on the Rights of the Child in any given country, that process should itself reflect the rights enshrined in the CRC. Pre-

³⁸ Ibid.

eminent among those is the obligation of the State Party to "assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child" (Article 12 of the CRC).

Legislation review on behalf of children's rights is clearly a matter affecting the child. The challenge is how to allow and enable children to acquire the information they need to form and express opinions, and how to create the conditions under which their views can be heard and "given due weight in accordance with the age and maturity of the child" (Article 12.1.). This is a flexible and fluid concept. It cannot be based on age alone, since the capacity to understand issues and articulate that understanding can vary considerably among children of the same age. The consultative process needs to be designed in such a way that children of an appropriate age to understand and comment on the legislation being considered will have suitable opportunities to present their views.

In some States Parties, creative and dynamic means have been found to facilitate children's participation in crucial discussions about legislation that affects them. In South Africa, children from all parts of the country were brought together for an intensive week of exchanging experiences, studying issues and presenting their opinions in a variety of ways – using songs, skits and story-writing to express their views.³⁹ The children in this activity were all over ten years of age, and capable of articulating both their experiences and their ideas fairly clearly. Younger children might, in similar circumstances, be given the opportunity to use drawing and play with puppets or dolls to tell adults how particular legislation has affected them.

Another model for children's participation is provided by the Caribbean Conference on the Rights of the Child. This was an intergovernmental meeting which took place in Belize City in October 1996 that used a number of innovative methods to engage the children of the Caribbean region in identifying important issues and developing recommendations for solutions in the Belize Commitment to Action. Schools all over the region were given resources to enable them to use the CRC as a teaching tool in the classroom and facilitate comment by

³⁹ Note: This is based on the author's recollection of a UNICEF video made around 1995.

students on key issues before the Conference took place. Individual children were given the resources to send their comments directly to the Conference, by letter, by facsimile or through the Internet and the World Wide Web, in some cases using the technical facilities of international organisations' offices. During the actual Conference session, children from Belize, with child representatives from other countries, held their own Children's Forum at the Conference site. There, they developed recommendations for action which were passed on to the delegates at the Conference and incorporated in the final text of the Belize Commitment.⁴⁰

In every case, the role of adults, in both government and non-governmental organisations, is of critical importance in opening the channels of communication and ensuring that the children feel they have been heard and that their views will have a positive effect.

The challenge of how to determine the "evolving capacity" of the child to reason and express opinions that merit consideration is one that affects not only the process of legislation review but also the content of recommendations for any changes to either legislation or practice. The term "evolving capacity" is used in Article 5 of the CRC to define the way in which parents, guardians and others (such as teachers of all sorts) who have care of the child, guide the child's own ability to claim and exercise the rights recognised in the CRC. It refers to the way in which a child's ability to understand and act on that understanding changes with greater experience and the development of intellectual abilities as the child grows older. It should not be taken to imply that children's *rights* evolve and change as the children become more mature, only that the ability of children to express opinions on the exercise of those rights changes.

In Article 12 of the CRC, this concept is presented from the perspective of how children's opinions are to be accepted and considered. They are to be "given due weight in accordance with the age and maturity of the child." The consultation process in the context of review of legislation should enable all children who are affected by the legislation to present their opinions. Those opinions should influence the

⁴⁰ Lundy, Christine, The Report of the Caribbean Conference on the Rights of the Child: Meeting the Post Ratification Challenge, UNICEF CAO, Bridgetown, p. 8, and author's recollection.

conclusions of the review to the extent that they carry the appropriate weight based on the capacity of the children to understand the issues being addressed and to comment appropriately.

A public consultation process that does not provide for appropriate participation by children who are capable of participating (whatever their chronological age) will not fulfil the obligations of the State Party under the CRC. Any recommendations that may come from such a process will likely inadequately reflect the real situation of children and the full range of measures needed to protect and promote their rights. The mere act of seeing and hearing children participate constructively in a review of the legislation that affects them can have a positive effect on the general public's perception of children's ability to participate in society.

2.2.6 Government Engagement

Throughout their consultation process, the JCRC in Jamaica worked closely with a long list of government ministries and agencies, which ensured that both the process and the resulting recommendations were endorsed by the government. The government ministries and agencies included the Children's Services Division, the Bureau of Women's Affairs, the Office of the Special Envoy for Children, the Planning Institute of Jamaica, the Ministries of Health, of Education and Culture, of Local Government and Community Development, of National Security and Justice, of Labour and Social Security, and the Office of the Prime Minister.⁴¹

This kind of significant government involvement is crucial to creating the conditions under which the conclusions of the review can be adopted by the government and used to generate appropriate action to reinforce the rights of children. It is particularly important that the government involvement in the Jamaican process was not limited to those agencies specifically charged with responsibility for children's matters. The review should also engage major ministries crossing all sectoral lines and involving the participation of the highest political levels (as in the Jamaican case, with the Office of the Prime Minister).

⁴¹ Jamaica, p. 18.

This broad commitment would clearly show priority being given to the question of children's rights as reflected in legislation.

For most reviews of legislation, it will be extremely helpful to engage the active participation of at least senior civil servants and, ideally, the ministers as well who are responsible for government policy and action in the following areas:

- Planning
- Finance and Budgeting
- Justice (for both legal issues and drafting of legislation)
- Health
- Education
- Social Services / Child Welfare
- Labour
- Women's Issues
- National Security / Police / Prisons and Correctional Services
- Recreation / Culture
- Human Rights

2.2.7 Organising and Managing the Review of Legislation

The effectiveness of a legislation review depends on the strength and commitment of its coordination and management. Different countries have found a variety of ways to set in motion and maintain the momentum of such processes. In Ghana, it was the mixed (government and non-government) Ghana National Commission on Children which set the process in motion after their preparation of the first national report to the UN Committee on the Rights of the Child revealed a number of legal inadequacies.⁴² The process in Jamaica was led primarily by the non-governmental Jamaica Coalition on the Rights of the Child, although legislators and government ministries played important roles in the latter stages.⁴³ Venezuela's process was somewhat diffuse, involving several agencies and organisations, but the Special Congressional Commission held the process together and kept it focused on the objective of improving legislation dealing with children.⁴⁴

⁴² Ghana, p. 28.

⁴³ Jamaica, p. 18.

⁴⁴ Garate, p. 17-21.

In these examples, the importance of the role of NGOs and civil society is clearly demonstrated. Whether on their own or in cooperation with government, they provided leadership that ensured children were the priority. NGOs coordinated, lobbied government, conducted media promotion and public education and created space for public engagement in the review process. Effective civil society participation in the review of legislation requires that the various civil society organisations be strong and well-organised. This is not always the case. Particularly when they are expected to take lead roles in the review process, either on their own or in partnership, these fundamental representatives of the public interest will often need support. Such support may come from international agencies (such as UNICEF or Save the Children), from national NGOs or coalitions, or from the government structures which relate to the areas of concern of the civil society organisations.

Sometimes, the NGO sector cannot take a leading role in review. A number of factors may limit civil society capacity, including internal upheavals, political situations, difficulties in communication and travel between different parts of the country, and widespread illiteracy which may restrict people's access to information. In these circumstances, the government may have no option but to act on its own to promote some level of public consultation on legislation relating to children. This was the case in Burkina Faso, where the government took the initiative in assessing existing legislation and proposing changes.⁴⁵

Even in countries where civil society organisations have played a prominent role, the leadership and initiative taken by the government or by legislative bodies gave the review its validity and opened the way to improving the legislation relating to children. The improvement might have come through ensuring more effective implementation of existing legislation or by the development and adoption of new legislation more in keeping with the CRC and CEDAW. Since they have the primary responsibility for legislation and for the enforcement of laws, governments must be significant

⁴⁵ UNICEF Burkina Faso, *Legislative Reform Initiative: Phase II: Country Study*, UNICEF Burkina Faso (internal paper), Ouagadougou, date unknown, p. 28-9.

players throughout the review process and take full ownership of the conclusions of the review, as an essential component of their obligations under the CRC/CEDAW.

The process of reviewing legislation on behalf of children can be led by different entities at different stages, as was the case in Venezuela, for example.⁴⁶ There may be benefits to this approach, in helping to achieve different goals at different stages in the process. Raising public and political awareness of the importance of children's rights and the possible need to adapt laws to support those rights is a task often best suited to NGOs and other civil society actors, such as religious organisations and the media. This may help foster the political will to improve the way governments (at all levels) fulfil their responsibilities to children and their families in accordance with commitments under the CRC/CEDAW. If legislative changes are required, governments should take charge of developing the legislation and setting the conditions under which the new legislation can be implemented effectively. These goals may well be easier to achieve if the various strengths and expertises of different entities can be brought to bear at the appropriate times.

Steps in Legislative Review

1. Identify coordinator
2. Clarify reason for review
3. Define scope
4. Set time-line
5. Clarify methods to be used
6. Identify participants in analysis and consultation
7. Set up feedback system
8. Affirm government commitment to follow-up

There is nonetheless great value in having the process managed from beginning to end by a single coordinator. Changing responsibility for delivering results any stage in the process causes undesirable delays. Having the same coordinator throughout, motivated to achieve the objective of the review, makes for more effective management of the process. (That objective should be improving implementation of existing legislation and proposing recommendations for any new legislation that may be needed to support children's rights). This was the experience in Ghana⁴⁷ and Jamaica,⁴⁸ for example. As these country examples also show, the value of having a single coordinator is enhanced when that body includes representation from both the government and civil society.

⁴⁶ Garate, p. 14-35.

⁴⁷ Ghana, p. 13-14.

⁴⁸ Jamaica, p. 18-19.

Whoever assumes responsibility for overseeing the legislation review process must understand that this is a major commitment of both time and resources. Both overseeing the work of technical analysis and managing the broad public consultation require people who have themselves the analytical skills and management expertise to do this work effectively. In many countries, there may be a need for outside assistance to do this well. Drawing on regional capacities to take advantage of positive experiences in neighbouring jurisdictions could be of great help. There is, therefore, an important supportive role for organisations such as the African Union and CARICOM.

While direct involvement in the process by international agencies (such as UNICEF and Save the Children) would not be desirable, since the process and its final result must be fully owned by the government and people of the country concerned, there is a significant role these agencies can play in supporting the organisation(s) which are taking a leading role in creating change that benefits their own children.

The review of legislation as it affects children's rights can be contained within a political or administrative structure (government department or ministry or an independent institution) or it can be established as a free-standing and self-sufficient process. Examples of the latter approach include national enquiries or special commissions tasked with conducting a thorough examination of the present situation and coming up with recommendations for future action, including reform of laws if needed. Some countries used the more independent mechanism effectively in the 1970s and 1980s to examine socially significant issues such as the status of women or relationships between different ethnic or religious groups. This approach may also be extremely useful now, in the context of children's rights and the law.

2.2.8 Structure of a Review of Legislation

The coordinator of the legislation review will probably start the process by clarifying the context: the reasons for undertaking the review in the first place, the scope of the review's activities and the length of time that the process is expected to take. The plan for the review should outline the anticipated operation of both the analytical and consultative aspects. Ideally, these should be implemented together, so that they can interact and reinforce each other. This was

the case in Venezuela, where the technical work of the experts who were assessing and drafting new legislation occurred in parallel with the various public activities that allowed civil society and specialised interest groups to present their views of legislation for children.⁴⁹

The review coordinator should also identify the methods to be used throughout the review. In addition to a formal analysis of the legislation being studied in relation to the CRC/CEDAW, it may be helpful to conduct specific studies to determine the effect and the effectiveness of particular measures (which could include, in addition to legislation, social policies, government programmes and institutional activities). Some possible methodologies to consider are:

- socio-economic studies of affected groups;
- statistical analysis (including gender- and age-sensitive data);
- public opinion surveys;
- "audits" of the implementation of certain pieces of legislation;
- public meetings;
- focused consultations with specific groups; and
- in-depth interviews with those whose lives are affected by the legislation, including children and their family members as well as the people who implement programmes and policies related to the legislation.

There may be a place, in this process, for reference to experts and to experiences in other countries with similar legal systems.

The review process should have a clearly defined timetable. While it is important to take enough time to complete a thorough analysis of the legislation and to develop suitable and useful recommendations, the review should not be open-ended. A review that continues for months or years without any appreciable achievement in terms of either developing a broad national consensus on children and their rights or determining specific recommendations about the next practical steps to be taken will not be seen as helpful or effective. A comprehensive review, which covers all aspects of children's rights in the country, does not need to be exhaustive. There should be a clear deadline for

⁴⁹ Garate, p. 18.

the completion of the review from the beginning, and the process should be implemented on the basis of a realistic schedule.

From the beginning, it is important to determine the degree of specificity needed to attain a clear view of the situation without losing focus. Too much detail can cause the reviewers to become immersed in legal minutiae and lose sight of the real goal, which is to see if the legislation currently in place fully respects, protects and promotes children's rights and, if it does not, identify ways in which it might be improved.

Appropriate "feedback" mechanisms throughout the process will help to keep it relevant and responsive to not only the real legal situation of children but also to public expectations. For example, in Venezuela, the regular exchanges between the Special Congressional Commission and bodies such as the Centre for Judicial Research and the NGO coalition sought participation of the various parties involved in the review process and ensured that the inputs of each one were available for the others to incorporate into their own conclusions. As the review process unfolds, it is likely that public expectations will change in response to the availability of more and better information about the situation of children's rights. From the beginning, flexibility must be established in order to adjust either the questions being asked or the methods employed as the situation evolves.

Whether the initial analytical phase of the review process is conducted by a small number of experts or takes the form of a broader and more public exercise, it will be important to define the scope of the exercise, by identifying the legislation and any related policies, programmes and institutional structures that will be subject to review. It is self-evident that the more legislation there is to be analysed, the longer the review process will take and the more complex it will be. This consideration should be balanced against the recognition that it will also result in a more thorough and comprehensive assessment of the ways in which legislation affects children's rights.

The end result of the review should be to promote further action as needed. If there is a report, it should not be left to sit on a shelf, unopened, its recommendations unimplemented. From the beginning of the review process, there should be a firm commitment from the

government to act in response to the conclusions of the review. This will also make the process much livelier, because people who participate will know that their contribution will have some effect on actions that will be taken later.

2.2.9 Reviewing Legislation

As a point of departure for the review, consideration may be given to the constitutional basis for the legislation. This can involve the more technical aspects of the constitutional structure, such as the division of powers and responsibility among different jurisdictions in a federal system, as well as an assessment of the ways in which constitutional guarantees and protections of human rights relate to the provisions of the international Conventions. It can be particularly useful to identify those areas in which national human rights protections surpass those provided for in international instruments.

Some national constitutions have clearly defined provisions relating to children's rights, outlining specific government responsibilities to adopt and implement legislation to give effect to those provisions. Such provisions may provide the impetus for a review of legislation as it relates to children's rights. In other countries, the constitutional provisions applicable to children's rights may be general, in the context of the rights of the broader population, so interpretation of the relevant guidance may be needed to clarify how they relate to the specific rights of children. (See Chapter 3 below for further examination of this aspect of the review process).

Since one of the goals of the review is likely to be to generate changes in attitudes, behaviour and, if necessary, legislation in favour of children's rights, and to do this as quickly and effectively as possible, the efficiency of the review is an important consideration. This means carefully selecting the legislation that will be assessed as part of the terms of reference of the review. The selection may be fairly straightforward, especially if the review is undertaken in response to specific concerns, such as a gap in coverage of children's rights identified in the course of reporting to the Committee on the Rights of the Child, or as a result of a court challenge based on children's rights and a subsequent judicial decision that calls into question some

existing legislation, or because of a concern that is brought to the public's attention by media coverage.

The legislation to be reviewed might be divided into three categories of decreasing priority:

1. Legislation at the national level which deals directly with matters affecting the rights of children, such as laws relating to marriage, divorce and child custody; juvenile justice; and services for disabled children;
2. Legislation at the national level which, while not referring specifically to children, nevertheless has an effect on them and their rights, such as legislation on the operation of electronic media; regulations for employment programmes; and laws governing the safety of automobiles; and
3. Legislation at other levels of government that has an effect on children's rights. This may be given increased priority in federal States in which the lower levels of government have primary or significant roles to play in the areas covered by the CRC/CEDAW (for instance, family law, education or health care), or in decentralized States which make districts or municipalities responsible for delivering services in sectors affecting children. This is a broad category, which can cover everything from criminal law, the organization and operation of police and correctional services (in federal States with decentralized responsibilities), to the setting of speed limits in school zones and municipal rules about the operation of stores selling products to children.

In many jurisdictions, some legislation relating to children and their rights may already be assembled into a compendium, for example dealing with family law or juvenile justice. In common law countries, such a compendium would also include relevant jurisprudence, and in Islamic law countries it would naturally incorporate the various elements of *Shari'a* that are applied there. Countries with plural legal systems involving traditional or customary law would include those practices as well.

If such a catalogue does not exist, it might be worthwhile to compile one as the first step of the review process. Such a compilation would

be useful not only for the review but also for the work of children's advocates in a variety of contexts. Preparation of such a compendium should be done with the recognition that legislation affecting children and the exercise of their rights does not always refer explicitly to children in titles or short descriptions. Some knowledge of the general content and application of such laws will help to determine their applicability in the context of the review. (This would be a good exercise for students of law or related disciplines).

Challenges of Legislative Review

1. Differences between legal systems
2. Problems of enforcement (economic, geographic, cultural, social)
3. Lack of capacity to implement laws
4. Implicit discrimination
5. Application of a relativistic approach which sets priorities among rights

In countries with plural legal systems that have a component of traditional or customary law, the challenge may be to pull together adequate information on the customary law, which may not be written or may be written only in very vague terms. The review may have to undertake a compilation of customary jurisprudence by interviewing traditional chiefs or others who administer the customary law if such

information is not otherwise available. To the extent that the customary law is a valid and active determinant of children's treatment in society, it needs to be taken fully into account at all stages of the review. In Ghana, for example, the legislation review took account of such issues as succession under customary law, forced and early marriages, economic slavery and other matters in which the customary law had a clear effect on the ability of children to realise their rights. Without taking such aspects into account, any analysis of legislation as it is applied to children in Ghana would have been incomplete and the conclusions reached by the review would have been less relevant as a result.⁵⁰

It is also important to consider the implications of legislation which seems purely technical or irrelevant to the interests of children. The study conducted in Yemen, for example, pointed out that a new *Law on Local Administration* would result in a decentralization of responsibility for delivering government services, which would lead to a greater chance of government programmes meeting the real needs of children in the community because the people responsible for the programmes

⁵⁰ Ghana, p. 16-9.

would be from the community the programmes were affecting. This would be predicated, however, on the availability of adequate resources at the local administration level to deliver the necessary services.⁵¹

As the legislation is assembled by category, one thing that is likely to emerge is a lack of balance between different categories of legislation. For example, in Haiti⁵² and Gabon⁵³ much detailed legislation is in place to determine the nature of a child's paternity ("legitimate" children, "natural" children, children born of adultery or incest, even children born to two successive legitimate marriages)⁵⁴ but provisions to govern the institutional care of abandoned or orphaned children are notably inadequate.⁵⁵ Even at this preliminary stage of the analysis, it should be possible to identify gaps and areas where more attention is needed. The accumulation of conclusions such as this throughout the review, fed back into the process of both analysis and consultation, will lead to the development of clear recommendations for action, which should be the final result of the review.

It is inevitable, where two or more different legal systems operate in the same country, that the review of legislation will have to address conflicts in both principle and practice between systems. Even when the constitution establishes which system (usually the law-based or

⁵¹ Beatty, Sharon, Dr. Barbara Croken, Abdul Hakim Al Hamdani, Fatima Jibrán, Saed al Mahktafi, *Impact of the Convention on the Rights of the Child in Yemen*, Rádda Barnen/Save the Children, Sana'a (25 August 1998) [henceforth: Yemen], p. 10.

⁵² Vieux, Serge-Henri and Bernard Gousse, *Étude Comparative entre la Convention relative aux droits de l'enfant et La législation haïtienne*, publication details unknown, unpaginated [henceforth: Haiti].

⁵³ *Plan Étude Comparative entre la Législation Gabonaise, La Convention relative aux droits de l'enfant, La Charte Africaine des droits et du bien-être de l'enfant*, UNICEF (internal working document; no publication data) [henceforth: Gabon].

⁵⁴ Haiti, p. 8-12, p. 56-9, p. 83-5, p. 113-6; Gabon p. 9-19.

⁵⁵ Gabon, 17th page (being orphaned as a prerequisite for adoption) and 23rd and 24th pages (guardianship), but the section on children in care of the State (22nd and 23rd page) refers only to children removed from their parents' care, either for the child's protection or at the request of their parents. There is no reference to orphans in institutional care. With regard to abandoned children, the only reference is in connection with birth registration (10th page). Haiti discusses adoption (11th and 12th pages) without mentioning orphans. Adoption is also dealt with as a remedy for abandoned children (61st to 67th page). The 29th page contains a reference to support for minor orphans of civilian or military employees of the State. The care of abandoned children as vagabonds, who must be placed in re-education institutions until they reach the age of majority, is referred to on the 31st page but no description is provided for the structure and operation of such institutions, although the comment is made that there are not enough of them.

judiciary-based one) will prevail in event of differences between the approaches taken by the two systems to the same situation, tradition and custom can exert a strong influence on people's behaviour. The review may well have to take a position on the implications of such differences between law and custom for children's rights. Those conducting the review will have to be prepared for the possibility of conflict in responses to the review's position on what may be very sensitive issues.

Equally important as assessing legislation as it is written, in relation to the specific Convention provisions, is assessing the implementation of that legislation and the way in which that implementation affects the situation of children's rights. Non-legislative instruments of government may also be relevant in assessing the effectiveness of legislation in specific areas. Such instruments could include social policy declarations, operational plans of the relevant ministries, budgets and other fiscal documents of government, and the organisational structure, management and monitoring of institutions dealing with children.

Many countries have wonderful laws on their books that perfectly reflect the commitment to children's rights expressed in CRC/CEDAW, but in actual practice the result is less than ideal. In Haiti, for example, the study found that there is a legal requirement that all children attend elementary school, with explicit penalties (fine or imprisonment) for parents whose children do not attend school. Even so, a large percentage of children do not attend school, and their parents do not suffer penalties. Indeed, it is doubtful that the penalties would lead to the legislated goal because of the economic factors which prohibit school attendance for poor children.⁵⁶ The existence of a law compelling education does not, of itself, fulfil the requirements of Article 28 of the CRC or, for that matter, Article 10 of CEDAW.

The assessment of legislation relating to children's rights should take into account aspects of implicit discrimination through the unequal application of those laws across gender, geographic, economic, social and cultural differences. The Haiti study provides another example of

⁵⁶ Haiti, p. 21-2.

this in the legal provisions relating to birth registration.⁵⁷ The law establishes that all children are to be duly registered at birth. The registration process, however, requires the services of a civil registry official. Every canton is supposed to have such an official, but almost half of them, primarily in isolated rural areas, do not. As a result, children born in those cantons are not registered as required by law, not because of any deliberate neglect on the part of parents, but because of the circumstances that affect the implementation of the law. This is a clear example of geographic and perhaps also economic discrimination (since those with economic resources would be able to travel to towns with a civil registry official to register their children's birth).

There is still a strong sense in many parts of the world – not just in countries with customary legal systems – that matters concerning children and the family, including such issues as early marriage, female genital mutilation and child labour, should not be dealt with, much less controlled, by the authorities of the State. The virtual wall that has divided the household, the domain of the family and traditional practices, from the wider society governed by laws and concepts of rights remains a source of controversy in many, if not most, countries regardless of their type of legal system. It is this wall that is being dismantled by the application of universal human rights principles to children (and, to the extent that they are also confined within the household, to women).

This can make the review process more complicated and it may require more time and public education to complete satisfactorily. Throughout, the review process should maintain the principle that all human rights are universal and indivisible – they apply to everyone equally and recognition of one right entails recognition of all. This is the case because rights are inherent in each human being. Just as each right applies to all people equally, in accordance with the principle of non-discrimination, so too do all rights apply equally to each individual. For this reason, the opportunity for public education about children's rights provided by a debate about the application of rights in different societies may be one of the more significant benefits of the review process itself.

⁵⁷ Haiti, p. 8-9.

2.2.10 Using CRC and CEDAW

Whatever the reason for undertaking a review of legislation with regard to children's rights, the Convention on the Rights of the Child (CRC) and the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) will naturally be a focus for the examination of existing legislation and practice. There are two complementary ways of using CRC/CEDAW in this process.

On the one hand, the Conventions can be used as a "checklist," taking each article individually and looking to see if there is existing legislation that relates to the rights specifically mentioned in that article and, if the legislation does exist, determining whether it satisfies the obligations under that article, both in its formal expression and the way in which it is enforced and implemented.

On the other hand, the CRC and CEDAW can be used as a standard against which all existing legislation, programmes, policies and institutions are measured. This approach involves starting with the legislation and practice and assessing their appropriateness against the two Conventions as a whole.

With the first approach, there will be a clear link between the CRC/CEDAW and specific measures in place so that a State will be able to demonstrate, if required, the extent to which obligations under the Conventions have been met. However, this approach does not easily take into account any legislation, policies or programmes that may not directly relate to the provisions of the Conventions but which, nevertheless, have an effect on the fulfilment of certain rights. That need is satisfied by using the "standard of comparison" approach.

A number of useful resources are available to help with the analysis of the legislation on the basis of the CRC and CEDAW. For each Convention, the Observations of their respective Committees on the reports of the State Party can provide guidance as to the intention and meaning of various articles. For the CRC, the *Implementation Handbook for the Convention on the Rights of the Child* is an extremely valuable reference. It explains each of the articles in clear and readily accessible language, with copious references to the Observations of the

Committee on the Rights of the Child to demonstrate how the provisions of the CRC can be realised in practical terms, including through legislative action. The General Comment Number 5 of the Committee on the Rights of the Child is also a useful reference, addressing in some detail the General Measures of Implementation of the Convention.

The easiest way to use the CRC and CEDAW as a checklist for the analysis of legislation relating to children is to break the Conventions down not just by article but also by the individual provisions within each article. For example, Article 18 of the CRC (which describes the responsibilities of parents for bringing up their children and the responsibility of the State to support the parents by providing institutions, facilities and services for the care of children) could be addressed by looking for legislation that:

- Provides measures to ensure that both parents are involved in bringing up and caring for their child(ren); this could include legislation on recognition of paternity, child custody and support in cases of separation or divorce, and parental leave at the birth or adoption of a child;
- Provides standards against which to determine whether parents have the best interests of their child(ren) as their basic concern in the treatment they accord to their children; this could include legislation dealing with parental failure to provide the necessities of life, with exploitation of the child in family businesses (including farming) at the expense of other activities such as education, and with child abuse in various forms;
- Provides for government-supported programmes of assistance to parents and legal guardians; this can include such matters as access to subsidized food and housing, financial support for families, free access to basic services such as health care and education, and any special programmes to help parents of disabled children obtain the services they need for their children;
- Provides for the establishment and adequate funding of institutions, facilities and services for the care of children; these include regulated child care, early childhood development, programmes for disabled and disadvantaged children, and

rules governing the operation of boarding schools, recreation programmes and "summer camps" that have the care of children for extended periods of time away from their parents.

It is tempting to stop the checking process after one key piece of legislation has been identified and so neglect others that might have important relationships to the Convention provision being addressed. It is also tempting to stop with the statement of the legislation and not take into account its effectiveness in practice. In this way, the relationship between certain rights and a range of legislation and related measures can be lost. In particular, such a curtailed review may not catch contradictions within the total body of legislation, or between legislation and policies or customary practices, which would have the effect of undercutting the provisions of the CRC/CEDAW. For example, analysis using the CRC/CEDAW as a "checklist" may find, in relation to Article 16 of CEDAW, that written legislation sets a minimum age for marriage at 16 years for both girls and boys. But if the analysis stops there, it could fail to take account of the fact that, under customary law, girls as young as 12 years of age are routinely married to men three or four times their age in certain regions, a situation which certainly violates the rights of those children.

All the legislation that applies to a specific provision of the CRC/CEDAW should be taken into consideration. In countries with common law and Islamic legal systems, judicial decisions and other relevant authorities should also be included. Customary practices may be given equal weight to written legislation if those practices are considered to be equivalent to statutory law in determining people's actions. If the legislation dealing with children is consolidated into a comprehensive law, such as a Children's Code, the analysis should draw out those sections of the Code that relate to the specific Convention provisions, and treat those sections, for purposes of the analysis, as if they were to some extent independent. They may then be assessed, not in relation to the rest of the Children's Code, but by the way in which they relate to and affect the implementation of other legislative measures, jurisprudence and customary laws that are connected to the same Convention provision.

Where there is a conflict between pieces of legislation, or between laws and jurisprudence, Islamic law principles or customary practice, the

review should determine which one(s) takes precedence. The constitutions of countries with plural legal systems generally contain provisions which clarify the relationship between the different legal systems. In Zambia, for example, it is made clear that the common law and the formal system of law courts and judges will overrule any decision made under the customary law.⁵⁸ Constitutional strictures and actual practice may differ, however, and the common law system may not be able to overrule decisions of the customary law if people affected by those decisions are deterred by social pressure or lack of resources from taking their cases to court. Circumstances that prevent children from claiming their rights in countries with plural legal systems should be taken into full account by the review.

The analysis should identify any divergences between the Conventions' provisions and the legislation and practices within the country. For example, the review of legislation might consider Article 28(a) of the CRC, which requires that education be "compulsory and available free to all," by noting the existence of legislation requiring that every child go to school until the age of 12, and that there should be no charge for to attend. The State might claim that Article 28(a) had been satisfied. But if the free schools are overcrowded and staffed with unqualified teachers, they may meet the letter of the CRC while failing to provide the sort of education children need. The education offered may not be sufficient to fulfil the rights of the children and their community. Thus, the provisions of the CRC should be seen as merely the starting point for a country's efforts to deliver the best education possible for its children.

The analysis may identify legislation that seems to demonstrate compliance with the CRC/CEDAW, but omits certain groups or categories of children. For example, a law on child labour may be examined in relation to Article 32.1(a) of the CRC, which requires States Parties to "[p]rovide for a minimum age or ages for admission to employment." The legislation might be found to allow paid employment in agriculture only for children over 14 years of age. This would certainly comply with the words of the CRC, without taking into account the situation of children working without pay on their

⁵⁸ Information acquired by author while preparing training manuals on CRC for use in Zambia, 1996.

families' farms or children older than 14 working on farms to the detriment of their education. Thus, the law would not necessarily be the best possible expression of support for children's rights. A measure which went beyond the limited terms of the CRC, for example by providing protection for children working without pay and children caught between the need to work and the need to attend school, would be more desirable.

It is of interest to know whether the laws and/or practice fall below the standard set by the Conventions or if they exceed the standard. For purposes of legislation review, the standard of comparison will be the most stringent instrument ratified by the State Party. For example, a State Party which has ratified the Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict should review its legislation on the basis of the standard of the Optional Protocol, not Article 38 of the CRC, which sets a lower minimum age for military service and is less stringent in the restrictions imposed on military activity for those under the age of 18. The standards set in international agreements should be considered as the minimum goal for recognising, protecting and promoting the rights of children. Any State Party which can exceed those standards in the way it treats its children should be commended.

This raises the concern that reliance on the CRC/CEDAW exclusively as a checklist for assessing legislation can result in turning the minimum standards set out in the CRC and CEDAW into maximum standards for the purposes of national legislation. If the review assumes that the State's obligations under the CRC/CEDAW will be fully satisfied by complying with the specific provisions of each Convention article, rather than using the principles of children's and women's rights as guidance for all government action, fulfilling the letter of the Conventions can actually stifle their spirit. The Conventions are statements of the global consensus on the rights of children and women at the time they were adopted. Both the CRC and CEDAW make it clear that States are invited to exceed the standards set out in each Convention, and to adopt legislation and policies which provide more protection for the rights of children and women and offer more opportunity for the fullest possible expression of those rights.

The situation may arise in which no legislation is found that relates directly to a specific provision of the CRC/CEDAW. For example, the constitution of Bosnia and Herzegovina has no specific provision dealing with social protection (the theme of Articles 26 and 27 of the CRC), although some measures exist at the level of the two entities that compose the country (the Federation of Bosnia and Herzegovina and Republika Srpska).⁵⁹ In such a case, the lack of national legislation would be noted by the review, and the measures in place with the lower levels of government would be taken into consideration.

Similarly, an analysis of the *Code Civil* of Gabon identified links between the provisions of the *Code* and a range of rights drawn from provisions in the CRC and CEDAW. The assessment given in the report on this analysis was that there were no significant divergences between the *Code Civil* and the Conventions. However, there is no mention in the analysis of limits to military service by children or of services for children with disabilities, so these would seem not to be covered by what is presented as comprehensive legislation for children.⁶⁰ Such omissions become obvious when the checklist method is applied.

The legal analysis in Gabon also found that, under customary law, children did not have freedom of expression or freedom of religion, while under the civil law there was no protection for children's privacy.⁶¹ The category of participation rights is likely to be the one most often neglected in national legislation, because of the prevalence of traditional attitudes to children as objects rather than subjects of rights. The review should pay special attention to these rights in assessing legislation. Measures that affect children's participation rights may be found in a wide range of legislation, including that which deals with health care (consent to treatment), education, family status, employment, public information, libraries, the Internet, and mass media, among other themes.

If no legislation exists that falls directly under a certain provision of CRC/CEDAW, the analysis should look for measures which

⁵⁹ UNICEF, *Legal Aspects of Social Protection for Children in Bosnia and Herzegovina*, UNICEF Bosnia and Herzegovina, undated, p. 9.

⁶⁰ Gabon, p. 83-92.

⁶¹ Gabon, p. 81-2.

approximate that provision. For example, if no laws are found which cover the conditions under which children may work, the general conditions of work as set out in a Labour Code may be considered in the review.

Inevitably, some legislation will come up again and again in relation to different provisions of the Conventions, especially if there is a Children's Code which consolidates a number of different measures for children. There may also be some legislation which has a bearing on the lives of children but which is not identified in the course of the checklist analysis. Legislation governing food quality, for instance, has an important impact on child nutrition but, since children are probably not mentioned specifically, that legislation may not be brought to attention based merely on the analysis of Article 24 (c) of the CRC (which among other things, requires States to assure the provision of adequate nutritious food to combat disease and malnutrition).

To capture those aspects of the situation of children's rights that may be missed with the checklist approach, a more extensive survey of laws can be undertaken, taking each element of the entire body of legislation and comparing it to the CRC/CEDAW as a whole. As a first step, the reverse comparison method may be an illuminating way to look at those laws which may already have been identified through the checklist.

Consider, for example, a hypothetical Children's Code which deals extensively with the requirements of birth registration, nationality and naming of the child based on paternity, the responsibilities of parents to care for their children, protection of the child from abuse or neglect, and foster care and adoption arrangements for children who are orphaned, abandoned or removed from their family for their own protection. The checklist method may identify links between the hypothetical Children's Code and Articles 5, 7, 8, 9, 10, 11, 18, 19, 20 and 21 of the CRC taken individually. However, a comparison of the Code against the standards of the CRC and CEDAW might reveal that name and nationality cannot be conferred on the child by its mother. The child would still have a guarantee of name and nationality, so the letter of the CRC might be considered to be fulfilled, but there would be a significant shortfall in relation to the full rights of both the child and the mother. Therefore, the Code could be deemed not to fulfil

Articles 7 of the CRC and Articles 5 and 16 of CEDAW taken together. Comparing each legislative measure (as well as policies, programmes and government budgets) to the Conventions as a whole, rather than to each individual article separately, helps to clarify the real extent to which the provisions of the Conventions are being implemented.

In another example, there may be a provision in the Children's Code dealing with the operation of child care institutions under the responsibility of the State. Analysis would then relate that section of the Code back directly to the CRC provisions in Article 25 (on periodic review of treatment), Article 20 (on protection of children removed from their parents in their own best interests) and other articles dealing with provision to children of the basic necessities of life (shelter, health care, food and education). The assessment of all those connections would show the extent to which the legislation was fulfilling children's rights.

After the legislation with the most self-evident connection to the CRC and CEDAW has been assessed, the review can consider other legislation (such as the food quality legislation referred to above) which can be understood to be of importance to the fulfilment of children's rights. For example, legislation relating to roads, railways and air travel, as well as legislation governing the issuance of passports and other travel documents can affect a child's mobility rights. Legislation dealing with public administration (as with the *Law on Local Administration* in Yemen) can determine the kind and quality of institutions and structures that are available to meet obligations of care for all children.

If strictly following the CRC/CEDAW as a checklist carries the risk of becoming too narrowly focussed on the specific provisions of those Conventions, the second approach of using the CRC and CEDAW as standards of comparison for all legislation, runs the risk of becoming a diffuse and academic exercise. It is possible, following this approach exclusively, to build up a massive amount of information about a whole body of legislation without having the analytical tools to determine what information is most relevant and helpful for the planning of action to improve the situation of children and women in regard to their rights.

Using the CRC and CEDAW as standards of comparison for a broad review of legislation has the virtue of comprehensiveness, but benefits from priority-setting, with the first priority being the legislation which is seen as having the most direct relationship to children's rights. This approach, by starting with the legislation itself, will find that many laws may relate to and reflect the same Convention provisions. It can also take into account other aspects of implementation of the CRC and CEDAW more easily, such as government policies, programmes, and administrative measures that may fall outside even the broad definition of legislation. As a result, a network of connections among all government measures and the CRC/CEDAW can be created, rather than the one-to-one correspondence that is most likely to result from the checklist approach. However, it is possible that, if certain rights are not reflected at all in legislation, this approach will miss some important obligations.

In practice, a blend of the two approaches seems the most effective and useful. Using CRC/CEDAW as a checklist ensures that all the rights of children are taken into account; using the Conventions as a standard for assessing all legislation, policy and administrative action means that the important connections among those measures and between the legislation and various rights set out in the Conventions will be given their due recognition. Children and their rights cannot be separated from the society of which they are an integral part. In a very real sense, everything that a government does, including the legislation, policies and regulations it adopts, will affect children in some way and so should be tested against the guarantees in the CRC and CEDAW.

2.2.11 Other Sources of Guidance for Review and Reform

Regional agreements on children's rights, developed in the context of similar cultural and traditional attitudes but with principles and commitments based on the CRC and CEDAW, may provide insights and measures that will support the legislation review in its efforts to make recommendations about ways to change attitudes and behaviours that are unfavourable to children's rights. Regional human rights instruments, such as the African Charter on the Rights and Welfare of Children, provide a regionally-focused amplification of the CRC. In addition, action plans based on the CRC, such as the Belize Commitment to Action for the Rights of the Child, may offer ideas

which can be incorporated into recommendations for national measures.

Additionally, the legislation review should take into account the full range of international instruments which complement and amplify certain aspects of the CRC and CEDAW, if the State is party to them. These might include the core United Nations Covenants, on Civil and Political Rights and on Economic, Social and Cultural Rights, which, together with the Universal Declaration of Human Rights, constitute the "International Bill of Rights" and are the foundation for all United Nations human rights agreements. International Labour Organization (ILO) Conventions that deal with child labour and working women will be helpful in identifying specific measures which can be taken to protect children from exploitation and neglect. The Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption amplifies the CRC's protections for children without parents. UNESCO resolutions and agreements relating to both protection of culture and education provide added dimensions to that aspect of child development. Three key United Nations instruments provide extremely helpful recommendations for the treatment of children in conflict with the law: the United Nations Minimum Standard Rules for the Administration of Juvenile Justice (the "Beijing Rules"), the United Nations Guidelines for the Prevention of Juvenile Delinquency (the "Riyadh Guidelines") and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty.

The review of legislation may also be guided by the comments and recommendations made by the Committee on the Rights of the Child in response to the periodic reports submitted by the State Party, as well as by the General Comments issued by the Committee to provide interpretations of specific articles in the Convention or to guide States Parties in their implementation of the Convention's provisions. The Committee's own analysis of the information presented to it can provide ideas and inspiration for both the direction of the review and its eventual conclusions. In particular, the Committee's Observations should serve to direct attention to the areas in which the most immediate action in favour of children's rights is needed, including legislation. From this, the review can develop its own recommendations, based on a study of the existing legislation in

theory and in practice, for revisions and new legislation needed to fulfil the State's obligations under the CRC and CEDAW.

2.2.12 General Principles

At each stage of the analysis of legislation, no matter what the specific right or rights being addressed, it is extremely important to bear in mind the four general principles that the Committee on the Rights of the Child has identified as being crucial to the implementation of every element of the CRC:

- Non-discrimination is the principle that the CRC applies to every child, no matter what that "the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status" (Article 2). The "other status" is important; it means that the list of the characteristics on the basis of which it is not permitted to discriminate against children is not limited. It can be expanded as circumstances dictate. As an example of this, discrimination on the basis of health status, would be a category of non-discrimination covered by this principle in countries where HIV/AIDS is a significant issue.
- The Best Interests of the Child is to be "a primary consideration" "in all action concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies," according to Article 3. Therefore, a judgement about the extent to which legislation gives appropriate weight to the best interests of the child is an essential part of the analysis of each law examined in the course of the review. The phrase "primary consideration" means that the best interest of the child would not necessarily determine the action to be taken, since other considerations would naturally be taken into account. However, decisions should at least incorporate an understanding of their effect on children's best interests.
- The Right to Life, Survival and Development represents a significant extension of the commonly accepted human right

not to be killed arbitrarily. In Article 6 of the CRC, it is recast as an active commitment on the part of the State to take the measures needed to ensure that children will be able to survive and develop their full potential. Later in the CRC, there are several references to "physical, mental, spiritual, moral and social development" (as in Article 27), so this fundamental principle applies not only to the necessities for bare survival (food, shelter and health care) but to every aspect of a child's life and, consequently, to all legislation affecting the child.

- The Right to be Heard for all children is the fundamental "right to express. . . views freely in all matters affecting the child" (Article 12). This is the principle which lifts the child from a position of subservience and powerlessness in society to being a full participant in all aspects of the political, social and cultural life of his or her community. Although the right is tempered by the qualification that the child's views should be "given due weight in accordance with the age and maturity of the child," it is necessary, especially for those laws that lead to decisions that directly affect a child's life, to provide the opportunity for all children to express their views.

Every piece of legislation reviewed for its application to the rights of children can be assessed in terms of the extent to which it respects these four fundamental principles. Article 3 of the CRC makes it clear that the primary importance of the best interests of the child applies to the work of legislative bodies, which includes the approval and adoption of legislation, and Article 12 refers to "all matters affecting the child," and as such it should be taken into account in all legislation affecting children, the development of government policies, the actions of State agencies and judicial deliberations.

The principle of *non-discrimination* is fundamental not only to the CRC but to everything to do with human rights. Since rights are inherent in all human beings, they must be applied without any discrimination. The recognition of this principle is the basis for CEDAW, which has as its goal the elimination of discrimination against women. In many parts of the world, women and girls continue to be the victims of persistent, sometimes subtle, but always present discrimination based solely on their gender, denying their capacity as individuals and their

status as human beings. A review of national legislation based on the CRC and CEDAW considered together, as two dimensions of the same objective, will naturally take the position that there should be no discrimination against women and girls. It is important, in this connection, that the review consider women not only in their capacity as mothers (although this is clearly important) but also as role-models for girls, whose rights guarantee that they should be able to develop their fullest potential as members of society in whatever they chose to do with their lives.

The *best interests of the child* is a concept that has generally been applied in matters concerning child care and custody, for example when parents separate and the decision must be made about how the children will be cared for and where (with whom) they will live. It has been extended, in some countries, to decisions made about who will be responsible for a child's care in situations of conflict between medically necessary procedures and religious or ethical principles of the child and his or her parents. This happens, for instance, when children who are Jehovah's Witnesses, or their parents on their behalf, refuse life-saving blood transfusions on religious grounds. In such cases, the children are made wards of the State for purposes of authorizing the treatment that is objectionable, on the basis that this is in the best interests of the child, whether or not the child agrees.

Even in the restricted sphere of family law, the concept of the best interests of the child is often a difficult one to deal with. Determination of best interest is generally made by adults, on the basis of their own experience and societal expectations. Thus, we can sometimes find a situation in which adults may argue in favour of a practice such as female genital mutilation, which is clearly prohibited in the CRC, on the basis that it is in the best interests of the child to follow traditional practice so that she will be accepted as part of the community, whatever the danger to her present and future health.

The CRC, however, extends the principle of best interests of the child far beyond the realm of family law. It is now to be applied "[to] all actions concerning children." This can be taken to mean all actions taken by a government, since virtually everything a government does will concern children in some way. This principle affects not just

legislation, but also government policies, administrative arrangements and budgetary provisions.

The question of what constitutes the best interests of the child can be a challenge for those undertaking a review of legislation in the light of the CRC and CEDAW. The solution to this quandary is simple: the best interests of the child are defined throughout the CRC by the specific provisions which identify the conditions under which a child will be able to develop as fully as possible. Thus, it is in the best interests of the child to have a name and nationality, to know his or her parents, to have as stable a home as possible, to be cared for in a way that meets all of his or her basic needs, to have an opportunity to participate in society to the maximum of his or her capacity, to receive a well-rounded education, to be protected from all forms of exploitation, abuse or violence, to be treated fairly by the police and justice system, to be able to play. If the provisions of the CRC (and related provisions in CEDAW) are all fulfilled, then the best interests of the child will be satisfied.⁶²

The *right to life, survival and development* connects the CRC to other major international human rights instruments, such as the Covenant on Civil and Political Rights (for the right to life) and the Covenant on Economic, Social and Cultural Rights (for survival and development). The extent to which this right is respected and put into practice in regard to the CRC will also affect the fulfilment of the related provisions in the other instruments. This is a right which requires not just that States refrain from negative actions that would cause injury and death to children. It also requires that agents of the State, notably the government, put in place positive measures which will actively promote the fullest possible development of their children, as well as ensure their continued survival. As a direct result of this principle, the public service sectors of health and education have an important role to play in fulfilling commitments to children's rights.

In the CRC, the right to survival and development is given specific definition from Article 23 to Article 29. These are the articles that outline the responsibilities of the State for the physical well-being and

⁶² Christine Lundy, *An Introduction to the Convention on the Rights of the Child*, St. Thomas, Full Circle Press, 1998, p. 51-4.

development and the intellectual development of the child. In analysing legislation from the perspective of the right to survival and development, it is important to bear in mind the full spectrum of "physical, mental, spiritual, moral and social development" which is referred to explicitly in Article 27.

Reference has already been made to the challenges inherent in creating adequate mechanisms for children to "express [their] views freely in all matters affecting the child" in relation to the process of legislation review. However, the *principle of hearing the views of the child* should also be taken into account in the analysis of the extent to which legislation meets the standards set by the CRC. The content of laws and regulations, the institutions set up to provide for children and the actual practices that deal with children in all contexts need to be assessed not only in terms of the way in which they serve or promote the right to life, survival and development in the best interests of the child, without discrimination, but also on the basis of the ways in which children themselves are able to participate in both the development of the laws and regulations and their implementation, to the extent that this is reasonable and appropriate. Some subjective judgement will likely be involved in assessing the extent of participation by children, but the effort should be made nevertheless.

2.2.13 Results of the Review

To be effective, the review process should not be merely an abstract exercise in legal analysis. The conclusions of the review should lead to specific action on behalf of children's rights, and these should be outlined clearly in the recommendations that result from both the analysis and the public consultation dimensions of the review. The recommendations should be as specific as possible, so as to guide subsequent governmental actions, including the drafting of any new or revised legislation as well as any policies, administrative arrangements or budgetary provisions that may be needed to give effect to the new or existing legislation. The recommendations should also provide a direction for continued public discussion of the principles of children's rights and their direct application. For example, the initial review in

Jamaica recommended the creation and adoption of a Child Care and Protection Act, something that eventually came to pass.⁶³

If inadequacies in terms of implementation of the CRC/CEDAW have been identified in the course of the review (and there is no country in the world in which some inadequacies would not be identified by a thorough review, given the aspirational natures of the CRC and CEDAW), it is not enough merely to identify them. The conclusions of the review should try to direct the response to those inadequacies by suggesting possible legislative and administrative measures that could be taken, in the spirit of Article 4 of the CRC. Beyond changes in legislation and the adoption of new laws, remedying inadequacies might involve, for example, identifying areas of the country's budget where greater resources could be allocated to institutions and programmes which serve to make children's rights a reality. Recommendations about education, information and training in children's rights for both the general public and the staff of governmental and non-governmental agencies working with children would also be appropriate.

The conclusions may take into account any limitations that may exist on a State's ability to implement the measures suggested, but this should not be used as an excuse for inaction. The recommendations may outline a phased process of implementation for the Conventions but it should be clear at all times that the complete fulfilment of commitments under CRC/CEDAW is a minimally acceptable response to the situation of children and that the goal, with clearly defined time lines for achievement, is to meet all obligations as quickly as possible.

In making these recommendations, those conducting the review should also indicate who will be responsible for ensuring that the recommendations are realised. Responsibility may be vested in one institution (such as the national coordinating body for children's rights, a specific government ministry with authority in the area of the recommendation or a legislative committee or appointee) or it may be apportioned depending on the action recommended. Without a clearly identified agent to carry the recommendations forward, they may

⁶³ Jamaica, p. 13.

languish unfulfilled, neglected for lack of a dedicated advocate on their behalf.

Throughout the review process, and in the preparation and publication of the conclusions reached, the primacy of the international standards for human rights should be maintained at all times. Where there are divergences between the internationally agreed standards and national or local practice, there may be a temptation to argue special circumstances which would obviate any need to change those practices to meet the standards set. One result of the review process may be to enable a State to withdraw reservations which may have been entered upon ratification of the CRC or CEDAW, once the relationship of national legislation to obligations under the Convention(s) has been clarified. This would help to satisfy the unwavering contentions of the Committee on the Rights of the Child that reservations are undesirable, urging all countries which have entered reservations to withdraw them, in the best interests of children.⁶⁴

There can be no exceptions to the universality of human rights principles, especially ones which have been as widely adopted as those contained in the CRC. Everyday practices which contradict the CRC/CEDAW are just as much subject to review, criticism, and reform, if required, as formal laws. The review process should be undertaken with this principle in mind. Any action or attitude which compromises the rights of children, especially as identified in the four fundamental principles of non-discrimination, the best interests of the child (the right to life, survival and development, and the right of the child to be heard) should be dealt with in the same way as legislation. The conclusions of the review of legislation may equally assess those attitudes and propose measures to change them.⁶⁵

The role of legislation in influencing behaviour is an important explanation for the CRC's attention to legislative measures in Article 4

⁶⁴ The Committee on the Rights of the Child, General Guidelines Regarding the Form and Contents of Periodic Reports to Be Submitted by States Parties Under Article 44, Paragraph 1(B) of the Convention [henceforth: Guidelines], paragraph 11 under General Measures of Implementation.

⁶⁵ The whole challenge of "cultural relativism" remains one of the major restrictions on full implementation of the CRC and CEDAW. This was clear from comments in the Haitian study. By contrast, the Gabon study makes the point that cultural attitudes can and should be changed.

and for the entire legislation review process advocated so strongly by the Committee on the Rights of the Child.⁶⁶ The purpose of legislation reform is not only to achieve State Party compliance on paper with its obligations under the CRC and CEDAW, but also to generate any needed transformation in public attitudes and behaviours with regard to children that tend in any way to undercut the rights of children. In the course of the review of legislation, the identification of customs, traditional practices and attitudes which contradict the provisions of the CRC and CEDAW should not be used to question the international standards but to guide recommendations for measures (legislative, administrative and others) which could be taken by the government in order to advance children's rights by changing those practices and attitudes.

2.3 Reform of Legislation

2.3.1 From Review to Reform

Once the legislation review is completed and the recommendations for improvements to legislation dealing with children are in hand, the process becomes more precisely focused on the details of reform of legislation to incorporate the provisions of the CRC/CEDAW directly in national law, so that the rights guaranteed to children will be justiciable – subject to due process in a court of law.

The variety of legislative and administrative systems currently operating in the world means that there are many different methods by which countries can ensure that the rights of children as set out in the CRC and CEDAW will be enforceable by law. The precise nature of specific legislation will depend on the situation of an individual country and its traditions, expectations and political realities. However, there are certain common objectives which should be achieved by every State Party and some common approaches which may be used even in countries with different legal systems. Together, these can help in the creation of legislation which benefits children and their families by putting into legal effect the rights and obligations defined in the CRC and CEDAW.

⁶⁶ Guidelines, paragraphs 12-4, 18 and 20.

In identifying the elements of reform which are important for every country to incorporate into their legislative process, the guidance of the Committee on the Rights of the Child is particularly helpful. Both in terms of individual countries, for which the Committee provides specific direction in the Concluding Observations on every report received from the States Parties, and in the general guidelines the Committee has provided for the use of all States Parties, the Committee offers insights into both the practicalities of and the philosophy behind the legislation needed to make children's rights a reality throughout the world. This section of the Handbook will, therefore, draw heavily on the rich resource of comments and recommendations from the Committee on the Rights of the Child to inform consideration of the process and the general content of legislation reform measures in favour of children's rights.

Even in countries where the provisions of the CRC and CEDAW are self-executing – becoming part of domestic law as a consequence of ratification or accession – there are variations in the ways that the provisions of the CRC and CEDAW are applied in judicial proceedings. There are also many instances of conflict in both action and intention between the CRC/CEDAW, incorporated into national law, and other legislation still in force which may work against the rights of children. Thus, there may be confusion about the relative weight that can be brought to bear in the making of a decision in court between the standards of domestic legislation and the international obligations. This situation can only be resolved by clarifying the domestic legislation to bring it into harmony with the Conventions.

For countries in which the CRC and CEDAW are not automatically justiciable, it is equally important to take the necessary steps to enshrine the provisions of those Conventions in domestic legislation. Without this crucial measure, the standards set by the CRC and CEDAW would be used by judges considering cases relevant to the Conventions merely as a reference for purposes of interpreting domestic legislation, and no legal arguments could be brought to bear specifically in regard to the State Party's obligations under the Conventions. As a result, one of the most consistent themes in the Concluding Observations of the Committee on the Rights of the Child for every country reporting on the implementation of the CRC is a

strong recommendation that domestic legislation be harmonised with the provisions of the CRC.

Especially important, for the Committee and for the promotion and protection of children's rights in general, is the need to ensure that the four general principles are incorporated into and reflected by all legislation that deals with children. Particular stress is placed on freedom from discrimination, making the best interests of the child a primary consideration, and respecting the views of the child. The Concluding Observations on the Initial Report of the United Kingdom are typical:

“The Committee would like to suggest that greater priority be given to incorporating the general principles of the Convention, especially the provisions of its article 3, relating to the best interests of the child, and article 12, concerning the child’s right to make their views known and to have those views given due weight, in the legislative and administrative measures and in policies undertaken to implement the rights of the child.” (*United Kingdom Initial Report Concluding Observations, Add. 34, para. 27.*)⁶⁷

These three fundamental principles are so important that they should be taken into account in any and all legislation dealing with children.

The right to life, survival and development is treated somewhat differently from the other three fundamental principles when it comes to the expectations of the Committee on the Rights of the Child for implementation. The right to survival and development is a succinct expression of the economic, social and cultural rights of children. The fulfilment of the survival and development rights of children requires State investment in services such as education, primary and advanced health care and a range of social services, for which many countries lack the economic or human resources. It is not expected that States with limited resources will be able to achieve the full implementation of these rights easily or quickly. The Committee on the Rights of the Child tends, therefore, to take a less stringent view of legislation and other actions States may undertake in order to fulfil the right to

⁶⁷ Implementation Handbook, p. 65.

survival and development.⁶⁸ However, there is always the expectation that States, whatever their means, will be steadily moving toward the full implementation of these rights, by gradually introducing the measures necessary to provide the services children are entitled to. In this, the CRC also provides the requirement that countries that offer international assistance should be tailoring their programmes to support fulfilment of children's rights to survival and development elsewhere in the world.⁶⁹ (Aspects of this will be discussed later in this Handbook, under the heading of "Follow-up and Implementation.")

The legislation review process will have identified those aspects of legislation which need to be clarified or expanded or amended, as well as legislation that needs to be repealed (such as discriminatory legislation). In addition, the process should outline any new legislation that may be needed in order to ensure that all legislation is compatible with the CRC and CEDAW and that all of the provisions of the Conventions are fully addressed. The conclusions of the review may provide recommendations about specific measures to be revised or new legislation to be adopted, as happened in Ghana⁷⁰ and Jamaica.⁷¹ Draft bills may also be provided as a starting point for reform of legislation.

Other factors may also enter into the legislation reform process. In fact, reforms of legislation may be proposed and undertaken before a review is started. The decision that reform is needed may be the impulse for review. However, the impulse to reform legislation is not self-generating. Changing laws to reflect changed social conditions and evolving public attitudes usually happens as a result of some pressure from outside the legal system. This can be the result of the adoption of a new political direction in the country, or it can respond to pressure from civil society based on increased awareness of both the existing situation and the possibility of creating change, in which the media may play a significant role.

In Venezuela, the first step toward comprehensive reform of national legislation with regard to children took the form of a draft bill

⁶⁸ Guidelines, paragraph 20.

⁶⁹ Guidelines, paragraph 21.

⁷⁰ Ghana, p. 14-6.

⁷¹ Jamaica, p. 13-5.

introduced into the legislature by a political party in opposition. This led to the creation of a Special Congressional Commission to review the proposed legislation. When that lost momentum, the National Institute for Children (a government agency) assumed leadership of the process. In the final stages, the primary force for reform of legislation became a coalition of 25 NGOs, "United for a Law for Children and Adolescents." Along the way, elements of a review of existing legislation were employed, primarily to serve as way of generating support for the proposed new law. At the same time, the debate and discussion about the proposed legislation generated a participatory analysis of existing legislation and led to a series of revisions of the proposed legislation that brought it closer to the full realisation of children's rights. Thus, review and reform proceeded together and supported each other, resulting in greater public understanding of and support for the new measure, and stronger government commitment to enforcing the legislation.⁷²

2.3.2 Developing New or Amended Legislation

Depending on the ways in which different legal systems frame their legislation, there are essentially two practical methods by which reform of legislation relating to children is undertaken. For many States, the most efficient way to achieve the goal of harmonising legislation with the CRC/CEDAW takes the form of a comprehensive overhaul of all relevant legislation by means of a single omnibus bill or Children's Code or, more practically, one code for the legal regime relating to child protection and family relationships and another dealing with criminal law and juvenile justice. This method is often used in countries with civil law systems, where there is a well-established tradition of codified law. Elsewhere, especially in some common law countries, the preference has been for law by law review and revision, with each piece of legislation amended individually or in small related clusters. Countries with an Islamic law system or plural legal system may take either approach, depending on the structure of their legal and justice system.

⁷² Garate, p. 14-20.

1. Children's Code

Approaching legislation reform by means of a comprehensive Children's Code has the advantage of immediately creating a substantial body of legislation dealing with virtually all aspects of children's lives. There is a clear complementary relationship among all parts of the legislation and the different components should be mutually supportive. The Committee on the Rights of the Child has shown a strong preference for this means of incorporating the CRC into domestic legislation. In the Concluding Observations on the Initial Country Report of the Lao People's Democratic Republic, for instance, the Committee's attitude was explicit.

"The Committee also suggests that the State Party envisage the adoption of a specific code or legislation for children, with a separate section on children who need a special protection." (*Lao People's Democratic Republic Initial Report Concluding Observations, Add. 78, para. 30.*)⁷³

Although a comprehensive Children's Code does make it easier to implement the CRC as a whole, the very breadth of coverage may present challenges. In Guatemala, for example, the difficulty of including all aspects of children's rights (notably the provisions relating to adoption) into one comprehensive piece of legislation meant that the Guatemala Children's Code, as it was finally passed, did not include some important elements; A separate law on adoption was approved later.⁷⁴

This situation demonstrates that the very complexity of such an all-encompassing law can make it difficult to adopt. There is always the risk that some segments of society may oppose certain parts of the Code and so end up derailing it in its entirety, or succeed in diluting thus minimising its effectiveness.

The experience in Nicaragua was more positive, with the adoption of a comprehensive Children's Legal Code in 1998. The Code replaced a number of obsolete laws which did not fit with the principles of the

⁷³ Implementation Handbook, p. 66.

⁷⁴ Garate, p. 23-8.

CRC, and it created a new legal framework for all aspects of the State's dealings with children. The Code, which deals with family law, children in society and the treatment of children by the justice system, covers most of the basic elements of the CRC and children's rights, including:

- the regulation of full protection of children by families, society, the government and private institutions;
- the definition of children as those less than 13 years old and adolescents as those between 13 and 18;
- the definition of children and adolescents as social individuals with rights;
- provision for equality of condition and opportunity, free from discrimination, exploitation, violence or other factors that violate children's rights and liberties;
- the definition of the family as the fundamental and natural entity to guarantee the growth, development and wellbeing of children and adolescents;
- establishment of the best interests of children and adolescents as a national concern, with full entitlement of all to full physical, psychological, moral, cultural and social development;
- special attention to children who belong to indigenous communities or minority ethnic, religious or linguistic groups; and
- identification of the role of the State in all of its forms as the guarantor of the survival and development of children.⁷⁵

The comprehensiveness of a Children's Code requires a thorough examination of all potential implications of each provision, both individually and for its influence on the implementation of other parts of the Code. It is also important to determine the impact of the Code on any other legislation that may continue in force, at all levels of government. Any legislation which will counteract the provisions of the new Children's Code will have to be either repealed and replaced by the provisions of the Code or revised to bring it into conformity

⁷⁵ Vijil, Mireille and Noemi Danao Cabuslay, *The Convention on the Rights of the Child Impact Study: The Study of Nicaragua*, Rädä Barnen/Swedish Save the Children, Managua, (November 1998) [henceforth: Nicaragua], p. 23-4.

with the new legislation. In Nicaragua, for instance, the review of other existing legislation meant close consultation with municipal authorities to avoid contradictions between the Children's Code and local legislation. The multiplicity of elements in a Children's Code can make it more difficult to predict the long-term effect it will have on the lives of children and on the country as a whole.

It should also be noted that, even with a comprehensive Children's Code, there will inevitably be other legislation (for example, technical legislation on micronutrient deficiencies, or broader legislative measures dealing with health care or marriage and divorce) which, while not specifically mentioning children, will have a significant effect on the rights of children. Even with a Children's Code, therefore, some attention will have to be paid to other specific items of legislation.

2. Law-by-Law Reform

In many countries, such as those that follow the common law tradition, the option of adopting a comprehensive Children's Code would not be easily workable. Such countries will choose the other approach to incorporation of the CRC and CEDAW into domestic legislation. This is to enshrine each provision, or a combination of related provisions, in individual laws that can be developed, debated and adopted separately. The changes in legislation may be proposed not only as a result of the review of existing laws but also to accommodate judicial decisions and perceived changes in public attitudes and behaviour. Separate measures may be necessary to bring the customary law into harmony with the principles of the CRC and CEDAW.

With regard to common law countries, it should be borne in mind that changes in law do not necessarily involve changes in legislation. Because the common law is created as much through judicial decision and precedent as through legislation, it is important to involve the judges in the reform process, through education and active engagement. Similar measures may be necessary with traditional leaders who implement and determine customary law. Where both written statutes and judicial or traditional decisions have a role to play in the development of law and establishing the basis for legal practice,

legislation reform can create the context in which the common or customary law is developed.

Jamaica provides one example of this approach. The process of revising laws following ratification of the CRC in 1991 involved the adoption of a series of measures, including:

1. The Inheritance (Provision for Family and Dependants) Act, 1993;
2. the Domestic Violence Act, 1994;
3. the Family Property Act, 1995;
4. the Legal Aid Act, 1997;
5. the Maintenance Orders (Facilities for Enforcement (Amendment) Act, 1999; and
6. the Citizenship (Constitutional Amendment) Act, 1999.⁷⁶

A review of legislation conducted in 1994, undertaken by a legal expert on behalf of the Jamaica Coalition for the Rights of the Child, produced a recommendation for the adoption of a "Child Care and Protection Act." Such an Act was adopted in 2004, repealing the 45-year-old Juvenile Act and providing a legal framework for the care and protection of children that emphasises the best interests of the child.⁷⁷

Although Morocco includes the civil law tradition as part of its legal system, it also follows Islamic law and the nature of its monarchical constitution makes the law-by-law approach more appropriate. The adoption of specific laws to deal with particular situations, such as the Abandoned Children Act and the Social Protection of Disabled Children Act, has helped to put some elements of the CRC into effect, and further legislative changes are planned.⁷⁸

The multiple law option, as opposed to the Children's Code approach, provides for a more gradual change in the existing legislation. At each step, it will be necessary to determine which of several laws or interpretations will prevail in the event of a legal challenge in the

⁷⁶ Jamaica, p. 9.

⁷⁷ Jamaica, p. 14.

⁷⁸ Ali, Shakeen Sarder, *Implementation of Child Rights in Muslim Jurisdictions: A Comparative Perspective of the CRC and Principles of Islamic Law*, UNICEF(internal document), New York, date unknown [henceforth: Shaheen Sardar Ali], p. 39-40.

courts. Generally, the legislation should specify that the newer law, the one more in line with the CRC and CEDAW, will have priority over other legislation which may deal with similar issues.

Such a process may take a longer time to complete than the adoption of a single Children's Code, but it is possible for the legislation that is of most urgent importance to be dealt with more quickly, at the beginning of the process. What this process lacks in comprehensiveness it makes up in attention to detail, as each piece of legislation is addressed on its own merits. It can also be more sensitive to the changing perception of children that should result from the application of newer laws based on the CRC, along with the public education and information campaigns that accompany the review and reform of legislation. The changing perception may also be reflected in judicial decisions before it reaches the level of legislation.

There may be duplication as the reform process goes on, because many different legislative measures have overlapping effects, so this process is not as neatly contained as the use of a Children's Code. However, it is usually possible, with the detailed analysis (by Parliamentary Committees, for example, as well as civil servants and the interested members of the public) that comes with each piece of legislation, to ensure that there are no conflicts with other existing or planned legislation.

The law-by-law approach may also serve to generate greater support for the implementation of children's rights. Since each individual piece of legislation deals with clearly defined and often limited objectives, it should be possible to develop a constituency of support for each one based on its own merits. Although the different measures may attract different constituencies, there should always be a clear base of public support for each one, which will make eventual implementation more effective. Also, it is often easier to educate the general public about specific provisions of one law dealing with a well-defined aspect of children's rights than to try to cover the whole gamut of rights at once, as with a Children's Code.

2.3.3 *Legislation Reform Process*

As has been noted, the Law Reform Commissions of Kenya and Lesotho played key roles in reviewing legislation relating to children and their rights in those countries. In countries with such bodies, the role of the Commission is to review all legislation and make recommendations to the government for revision of existing laws and adoption of new ones (for both civil and criminal law) as needed to meet the evolving nature of society. Specific legislation emerged from the reviews in Kenya and Lesotho to give effect to the CRC in national legislation: The Children's Act, 2001 in Kenya and the Children's Protection and Welfare Bill in Lesotho.⁷⁹

Other countries have established specialised bodies with a mandate to concentrate on reform of legislation relating to children. In Ghana, the Child Law Reform Advisory Committee was established in 1996 to make recommendations for legislation intended to effect the implementation of the provisions of the CRC. This was a mixed body, with institutional representation from government (the Ministry of Justice, the Ghana Education Service and the Department of Social Welfare), the legal system (the judiciary, legal practitioners and the Ghana Police Service), civil society (the 31st December Women's Movement, the Commission on Human Rights and Administrative Justice) and children (National Youth Council). This group reviewed national legislation in light of the CRC and CEDAW and made proposals for several laws that they expected would effectively translate the obligations of the Conventions into Ghanaian law and practice.⁸⁰

In Nicaragua, the drafting of the Children's Legal Code was coordinated by the National Commission for the Promotion and Defence of Children's Rights, a mixed structure that involved various ministries, government agencies dealing with children, church representatives and the NGO Coalition for the Rights of Children. As part of the drafting process, the Coalition held several consultations with community leaders, educators, students, parents, volunteers, professional associations, representatives of NGOs, politicians and

⁷⁹ African Child Policy Forum, *Harmonisation of Laws Relating to Children in East and Southern Africa: A Summary Report*, 2006 (draft), p.17.

⁸⁰ Ghana, p. 13-4.

Municipal Children's Commissions. Information workshops on the proposed legislation resulted in the formation of the Network of Promoters of the Children's Legal Code, composed of people who had experience in training and community development. They conducted more workshops at the community level, to spread the information about children's rights and the new legal regime for children as widely as possible.⁸¹

The initial draft of the Children's Legal Code was presented in 1996 but approval was delayed by the election in 1997 and the need to begin lobbying again with the new National Assembly. The adoption of the Code was, in large measure, due to the effectiveness of the network of NGOs and government agencies that supported and promoted it. The extensive public information and education programme undoubtedly served to build the necessary popular consensus in favour of the legislation even before it was passed, which in turn facilitated its approval by the newly elected legislators. This shows the importance of extending the legislation reform process beyond the immediate confines of the legislature, to engage the general public as well as special interest groups in making legislation more respectful of children's rights. It sometimes takes this base of support to convince legislators of the importance of taking actions which may challenge established practices.⁸²

A more formal legislature-led reform process was undertaken in China. The Internal and Judicial Affairs Committee of the People's National Congress began looking into revision of legislation dealing with children in 2005, with the intention of presenting the revised legislation in 2006. As a key part of the process, however, the NPC called for proposals for the new legislation from government agencies and social organisations. The All China Women's Federation took a leading role in promoting community-level consultations, regional workshops and children's forums to generate contributions to the new legislation. As a result, the proposed legislation reflected a broad-based public understanding of the rights of children as provided for in the CRC, including the general principles.⁸³

⁸¹ Nicaragua, p. 23.

⁸² Ibid.

⁸³ Hodges, Anthony, *UNICEF support for the review and revision of China's Law on the Protection of Minors*, UNICEF China Country Office, Beijing, 2006.

The impetus for reform of legislation can come from almost any source within society. The example from Canada, "Making the Grade," shows how the media and schools can empower children themselves to take the initiative in promoting new and revised legislation for their own benefit. There has been strong public support for the entire process, and students (with guidance from their teachers and experts in dealing with political matters) have been successful in lobbying politicians and civil servants. Although on a small scale, this is a good example of how to make it possible for children to participate directly in the reform of legislation that is important to them.⁸⁴

In the experience of many countries, the initiative for legislation reform has come from the government, which is often the best organised advocate for children's rights. In Morocco, the interest of the king in promoting children's rights has been a significant factor in the development and adoption of several new laws directly inspired by the CRC.⁸⁵ However, even with such strong governmental support, effective implementation of the CRC still requires broader public involvement. The cultural and social sensitivity of so many of the principles in the CRC and CEDAW mean that they are unlikely to be fully implemented without broad-based agreement within the general population. This highlights the earlier assertion that merely changing a law will not, of itself, change the situation of children. Reform of legislation is not effective without adequate provision for ensuring that the laws are fully enforced.

2.3.4 Ensuring Implementation of Legislation Reform

Even when considering written statutes, laws are only as effective as their enforcement allows them to be. Whether it is a comprehensive Children's Code or a series of individual laws, any legislation adopted to give effect to the provisions of the CRC and CEDAW in favour of children's rights should also include adequate provision for its own enforcement. This could include budgetary allocations, administrative

⁸⁴ Based on the author's correspondence with reporter Mike Wise, content of televised reports, and information available at www.cbc.ca/torontoatsix/. The government poster and other information about labour rights of children can be found at www.labour.gov.on.ca/English/site/youngworkers.html.

⁸⁵ Shaheen Sardar Ali, p. 44-5.

organisation, creation or reinforcement of institutional structures and promulgation of regulations as needed. When legislation specifies the creation of a particular structure to provide a service or implement a policy, there should also be a clear indication of how that structure will be funded and what resources it will need in order to operate as required.

For example, the legislation in Haiti that deals with children in conflict with the law mandates a special Tribunal for Children to be created in five jurisdictions distributed throughout the country. In practice, according to the study, *Étude Comparative entre la Convention relative aux droits de l'enfant et La législation haïtienne*, only one such tribunal is in operation, in the capital, Port-au-Prince. The law, therefore, is not being fulfilled. Similarly, in Bosnia and Herzegovina, the legal mandate for provision of social services for children and their families rests with the municipalities, that provide social protection services through Centres for Social Work. However, the legislation makes no provision for the financing of these services, and the CSWs are, in consequence, chronically under-funded.⁸⁶

Therefore, as new legislation in favour of children's rights is drafted, debated and approved, it should make provision for the mechanisms necessary for implementation. This was done with the Child Care and Protection Act in Jamaica. A specific government executive body, the Child Development Agency, was created through a merger of pre-existing bodies (the Children Services Division, the Adoption Board and the Child Support Unit). The Child Development Agency is charged with implementing the Child Care and Protection Act. Also given clear responsibilities under the Act is the Children's Advocate, whose office was established to act in legal matters on behalf of children. Further, the Act established a Central Registry to maintain records of all reported cases of child abuse. The Child Development Agency submits budgetary requests directly to the Ministry of Finance, operating on the same level as line ministries when it comes to consideration for the government's budget. To the extent possible, within the limitations that are naturally imposed by the operation of a democratic political system, the Child Care and Protection Act

⁸⁶ Haiti, 37th page.

contains the provisions which should make its implementation effective.⁸⁷

Legislation is made real only when it is put into practice. For that to work effectively, the people responsible for implementing the new or revised legislation need to understand what the legislation says and to have the skills necessary to fulfil what the legislation requires. The people affected include civil servants working for the ministries responsible for action under the legislation, social service staff and managers (particularly in child care agencies), teachers and school administrators, health care workers and administrators, and even private sector employers and the media who may be charged with providing information about the new or revised legislation.

For all these groups, training and provision of information can be critical to the success of the reform. They need to know more than the details of the new legislation and their role in its implementation. It is also important for them to grasp the underlying principles of children's rights which are reflected in the legislation, with special emphasis on non-discrimination, the best interests of the child, a commitment to child survival and development and the importance of paying attention to the views of the child. This information can be provided through a dedicated government publicity campaign, reports in the news media, study materials prepared for schools and professional training institutions (including law schools), and appropriate posters and advertisements.

It is particularly important to engage judges and other actors in the legal system (including lawyers, court clerks and other staff, custodial officers in both prisons and remand centres and police officers at all levels) in the full implementation of the provisions of the new or revised legislation. This may be especially important in common law countries, where the role of the judiciary is crucial to the definition of the law in all respects. The ability of the courts to pass judgement on the validity of laws in those countries means that judges, especially, need to be fully aware of the commitments made by their State to children's rights and the importance of the legislation in the fulfilment of those commitments.

⁸⁷ Jamaica, p. 15-7.

It is also important to involve the authorities who are responsible for the application of Islamic law in those countries where this is a part of the legal system, with particular emphasis on the relationship between the legislation and the precedents in the oral tradition and commentaries on the *Qur'an*. Where customary law is practised, the practitioners should also be given comprehensive training in the new legislation and its relationship to traditional ways, especially if the new legislation runs counter to those ways. In order to ensure that adequate training and information are provided as needed, it would be best if provision for such educational and information activities were included as essential components of the new legislation or its attendant regulations.

2.3.5 Monitoring and Public Information

Changes to laws or long-established customs can generate opposition and resistance. This is especially the case if those changes are seen as undercutting well-established attitudes or if they challenge power relationships that, for example, define an inferior or restricted position for women in society. As part of the legislation reform process, care must be taken to provide for an effective counter to responses that may seek to hinder or prevent the enforcement of the new legislation.

This can be done by undertaking a broad-based public information programme that stresses the positive value of the changes embodied in the reformed legislation, not just in terms of international obligations to be met but also, and more importantly, in terms of the benefits that will accrue to the country and its communities as a result of the legislation. While not necessarily part of the legislation or its regulations, such an extensive public education programme could be incorporated into the planning for the legislation and might be implemented throughout the consideration of the bill by the legislature. Such education activities could follow the pattern of the public information and education measures employed in both Nicaragua⁸⁸ and Venezuela⁸⁹ which accompanied and informed the process of debating and adopting new legislation dealing with

⁸⁸ Nicaragua, p. 30-1, p. 44-5 and p. 5.

⁸⁹ Garate, p. 14-8.

children and their rights. In this endeavour, the engagement of civil society groups that support the legislation would be extremely helpful. These groups may be encouraged to expand their lobbying of legislators in favour of the legislation to a broader public information campaign, possibly with support from the government or international organisations committed to the promotion of children's rights. The role of the media not only in disseminating information but also in shaping public opinion should not be overlooked.

The information provided to the general public as part of a specific campaign to promote acceptance of new or revised legislation that incorporates the provisions of the CRC and CEDAW into domestic legislation is one element of what should be a broader effort to increase overall awareness of children's rights. This can create a favourable environment for all legislation reform initiatives taken to fulfil obligations under the Conventions, perhaps even generating popular demand for such reforms. This would be particularly helpful in countries that follow customary law as well as statute, since the changes in public attitude that could be provoked by such a campaign would support efforts to change the custom as well.

In this process, as with specific reforms mentioned above, the involvement of NGOs and civil society in general is extremely important. Promotion of children's rights should involve not only advocacy organisations working on behalf of children which have long-standing engagement in the CRC/CEDAW, but a whole range of groups, including religious bodies (especially important in countries with Islamic law), professional associations and organisations which touch children's lives in areas such as sports, culture, education and family life. All available forms of communication should be used, including (in those countries where the facilities exist) new media such as the Internet and text messaging. Many UNICEF National Committees and organisations such as Save the Children have used their Internet sites not only to provide information about children's rights but also to generate action on behalf of children both locally and internationally.

Accountability and the effectiveness of each reform as it is implemented can build a general consensus in favour of children's rights, which will in turn support each new reform as it is made.

Monitoring the effect of reformed legislation on the lives of children can serve not only to justify the changes made but also to promote further reforms in the same direction. To provide the kind of objective analysis needed to validate the reforms, monitoring responsibility should be vested in an authority which is independent from political activity and identified specifically as an advocate for children and their rights. The model of a Children's Ombudsperson, following on the example of Norway that has been adopted in other countries, has been a preferred option by the Committee on the Rights of the Child, which encourages the establishment of such an official position in many of the Concluding Observations on country reports.

One example of such a monitoring body for the rights of children is the National Observatory for the Rights of the Child in Morocco, formed under royal patronage.⁹⁰ The interest of the Head of State means that this body has the authority to monitor the implementation of the CRC and to make necessary and appropriate recommendations for improvements to legislation to meet Morocco's obligations under the CRC.

A monitoring official or body can assess legislation, track the state of children's rights in relation to all aspects of the CRC/CEDAW and produce reports for the public and the government outlining both positive and negative conditions for children's rights in the country. There may be special value for such a monitoring structure in countries with plural legal systems, including those with strong traditions of customary law. The investigations conducted by the Children's Ombudsperson could draw attention not only to the situation of children's rights with regard to written law but also to the ways in which customary law affects children's rights. The publicity provided by the reports of the Ombudsperson for the treatment of children's rights under customary law could be a major force in the reform of customary law in favour of children's rights.

Monitoring the situation of children's rights will also help provide practical information on the effect of new or revised legislation produced by the reform processes we have been considering. Continuous feedback on the ways that legislation actually touches the

⁹⁰ Shaheen Sardar Ali, p. 44-5.

lives of children will reveal contradictions and gaps between and among laws that may not have been noticed before the legislation was adopted. The role of the Ombudsperson would not be to criticise or provoke controversy, but to identify problems before they reach a crucial stage and recommend solutions. This sort of attention, brought to bear in regular public reports on issues of common interest and concern, would also serve to identify at an early stage the opportunity for further reform of legislation that may arise as a result of the changing circumstances of children's lives, including changes brought about by the reforms initially adopted to meet obligations under the CRC/CEDAW.

2.4 Conclusion

As demographic trends evolve, global economic integration advances apace and the environmental conditions in which children are born and grow undergo dramatic transformation, the attitudes of individuals, communities and governments toward both their own children and their international obligations can also be expected to change. The change, in this case, is mediated and, to some extent, generated by the realisation in practice of the principles enshrined in the CRC and CEDAW, as a result of a well-thought-out and broadly participatory process of legislation review and reform.

Legislation that is adopted at least in part to meet a State Party's commitments to children as a result of ratification of or accession to the CRC and CEDAW should serve as more than a technical or even political measure to satisfy international requirements. It can, and should, give rise to changes in generally held attitudes and behaviour with regard to children on the part of adults, whether they are parents, teachers, health workers, social service workers, police officers, part of the legal system or just members of the community that includes children, and also on the part of children themselves.

Because so many people are affected by legislation that deals with children, the process of reviewing and reforming that legislation should reflect the broadest possible social consensus. This is why the process should incorporate a significant element of public information and education about children's rights and the commitments the State

has undertaken in becoming party to the CRC and CEDAW (where applicable). The process also needs to be one in which all concerned can express their opinions and feel that their views have been heard and taken into account in the final legal measures. In particular, the process needs to include children and their views, as a clear demonstration of the importance placed on the rights of children to participate in discussions about issues that matter to them.

Reform of legislation can take many different forms, depending on the nature of the country's legal system, the situation of children and the political process. The content of the legislation may vary, but it should always reflect the principles of the CRC and CEDAW. The four fundamental principles of the CRC should underlie both the review and reform process and the substance of all legislation. These principles – non-discrimination, the best interests of the child, the right to life, survival and development, and the right of the child to have his or her views heard on all matters affecting the child – are at the heart of the CRC and essential to the understanding and realisation of all children's rights. The process itself should be a demonstration of the rights of children, which is why it is so important to create opportunities for children to participate in both the review of existing legislation and the development of new measures of whatever kind, whether they be written laws, government policies, administrative procedures or public attitudes and expectations.

The public consensus developed through the process leading up to the adoption of legislation reforms is an important determinant of the effectiveness of the legislation as it is enforced. A change in legal measures dealing with children, made to respect children's rights, will be effective only if there is sufficient public support to ensure that the legislation is respected in practice. Effectiveness also requires that provision be made, preferably in the context of the legislation itself, for the necessary structures and resources to be put in place so the legislation can be implemented as intended. Among the structures needed to make reform of legislation as effective as possible is a system for monitoring the situation of children's rights, possibly through a Children's Ombudsperson or Children's Commissioner.

Legislation reform is an ongoing concern. As situations and attitudes change, there will need to be a review of the way in which new

legislation affects children's rights, and further reforms to that legislation will likely be needed as time goes on.

Glossary

Note from the author – The definitions of the following concepts are tailored strictly to the use and context in the text of the Handbook.

Affirmative action – A mechanism for promoting equal access by actively promoting the interests of people from groups that have traditionally experienced discrimination.

Automatic incorporation – A constitutional provision by which international treaties or conventions are automatically incorporated directly into domestic legislation, becoming immediately and fully justiciable. (See **Monist system** below).

Case law – In the common law system, law which is created by arguments and judicial decisions relating to specific cases. (See **Common law system** below).

Child-friendly court procedures – Processes and procedures which are designed to make the court accessible to and less intimidating for children who appear as witnesses or victims. Such measures include courtrooms specially designed to put children at ease, legal and support staff trained to prepare children by explaining the process to them in ways that they will understand, and provisions to involve family or other trusted individuals in both the court proceedings, in support of the child, and in follow-up and recovery programmes.⁹¹

Child trafficking – Any act which involves the illicit transportation of children from one place to another. International trafficking is defined by the crossing of international boundaries.

Children born out of wedlock – Children whose parents at birth are not legally recognised as being married to each other under the law application to these children.

⁹¹ RESOLVE Manitoba, “Child Victim Support Service”, *Resolve News*, Winnipeg, Manitoba, Research and Education for Solutions to Violence and Abuse, Volume 7, Number 2, June 2005.

Children in conflict with the law – Children who are suspected or accused of infringing criminal laws.

Children's codes (also known as children's acts or children's statutes) – Comprehensive legislation covering a wide range of aspects of the lives of children, usually including name and nationality, family relations, standards of care and protection measures.

Civil law – A system of law derived mainly from Roman law, emphasising the arrangement of laws into comprehensive national codes. Civil law relies heavily on written law.⁹²

Codex Alimentarius – A food code established by the World Health Organization (WHO) and Food and Agriculture Organization (FAO), defining quality standards to be met for food that has been fortified.

Common law – A system of law derived from English tradition, in which law is determined not only through written legislation (Statutes) but also by court decisions through the creation of judicial precedent from decisions on specific cases tried before the courts.⁹³ (See also **Case law** above).

Constitution – The fundamental law of a State, typically outlining the structure of government and the means by which the government will operate; may also include the principles of human rights which are intended to guide all government action, including legislation.⁹⁴

Criminal code – A body of law that defines criminal acts and the application of criminal justice.

Customary law – Usually unwritten, the system of law which has developed over time in specific communities or social groups, derived from long-established practices that have acquired the force of law by common adoption or acquiescence; customary law is sometimes

⁹² See Chapter 2 for more details.

⁹³ See Chapter 2 for more details.

⁹⁴ See Chapter 3 for more details.

administered by traditional chiefs and their councils, often dealing with matters relating to children and family.⁹⁵

Dualist system – Usually found in common law regimes, a system in which international treaties or agreements are not automatically incorporated into national or domestic law; such incorporation requires specific legislative measures to be accomplished. National laws need to be passed to incorporate the principles behind these treaties or agreements. (Contrast to **Monist system**, below).

Duty bearers – Those who are responsible for ensuring that the rights of designated groups are protected, promoted and fulfilled; for the rights of children, the State is the primary duty bearer and is responsible for creating conditions in which other duty bearers, such as parents, service workers, community leaders, the private sector, donors and international institutions, can meet their responsibilities for also protecting, promoting and fulfilling the rights of children.⁹⁶

Effective remedies – Judicial or administrative remedies intended to restore to a victim or victims of human rights violations those rights and entitlements which were denied and, in cases where this is deemed necessary by the authorities mandating the remedies, to extend compensation for losses sustained in the violation of the victim's or victims' rights.

Enabling legislation – In dualist countries, the means by which international agreements are incorporated into national law, through constitutional amendment, law or decree. (See **Dualist system** above).

Equal protection clauses – As a complement to non-discrimination provisions, these human rights provisions provide for equal access or equal opportunity for all.

Extra-territorial jurisdiction – The capacity of a State to apply law and exercise authority through the application of national legislation to criminal acts involving their nationals (as perpetrator or victim) and/or

⁹⁵ Heritage Community Foundation, "Nature's Laws: Customary Law", at Albertasource.ca, viewed 10 June 2008. See Chapter 2 for more details.

⁹⁶ Thies, Joachim, "Introduction to Rights-based Programming", *Part 1: Rights Based Programming – An Evolving Approach*, Save the Children, Sweden, 2004, p.3.

criminal acts prejudicial to the interests of the country or of its nationals committed outside the territory in which the law is enforced and of which the accused is a national. The exercise of extra-territoriality may be limited by the sovereignty of the State in the territory where the acts take place.⁹⁷

Family law – The body of legislation which addresses all aspects of family relations, including marriage, divorce, custody of children, responsibility for the upbringing of children, adoption (where permitted) and inheritance.

Female genital mutilation – Customary activities which entail mutilation of female genitalia (i.e. partial or complete removal of the clitoris, or the *labia minora* (excision) or of any external genitalia, with stitching or narrowing of the vaginal opening (infibulation)), often performed on women and girls.

Food fortification – The addition of micronutrients or other essential elements that may have been removed in processing to commonly used foods, in order to combat widespread micronutrient deficiencies.

Gender-sensitive court procedures – Procedures and processes which take into account their impact on women, men, boys and girls, including the special circumstances of women and girls, designed to overcome the marginalization of and discrimination against women and girls.

Good governance – The process by which public institutions conduct public affairs, manage public resources and guarantee the realisation of human rights in a manner essentially free of abuse and corruption, and with due regard for the rule of law.

Holistic approach (to legislative reform) – An approach which encompasses all the dimensions of the situations being addressed, for example taking into account the entirety of children's lives in revising legislation that affects children and addressing the issues in terms of

⁹⁷ Coughlan, Steve; Currie, Robert J.; Kindred, Hugh M.; and Scassa, Teresa, *Global Reach, Local Grasp: Constructing Extraterritorial Jurisdiction in the Age of Globalization*, Dalhousie Law School, Prepared for the Law Commission of Canada, June 23, 2006, pp. 4-8.

both the legal areas involved and the measures needed to ensure effective application and enforcement of the law.⁹⁸

Homogeneous system – A legal system based on a single legal tradition, either civil law or common law.⁹⁹

Human rights-based approach (HRBA) to legislative reform – An approach based on international standards and norms and on the full recognition of the equal rights of children, boys and girls, men and women and the realisation of State obligations under the international human rights instruments to which the State is party.¹⁰⁰

Indirect discrimination – Discrimination which does not occur by explicit prohibitions or restrictions, but rather by creating conditions in which certain groups are nevertheless effectively prevented from exercising all their rights; for example, by structuring voting in elections in such a way that people who cannot read are unable to participate, thereby effectively excluding a category of persons (illiterate, with disabilities etc.) from voting.

Inter-Convention approach – An approach which uses the broad spectrum of human rights instruments for the formulation of constitutional provisions, national legislation or government programmes.

International instruments – Internationally adopted treaties, conventions, covenants, protocols and declarations, including those that come under the United Nations, its Specialized Agencies or regional organisations.

International law – The body of norms and standards contained within international human rights and humanitarian instruments, including the human rights conventions and covenants of the United Nations system, the conventions of the International Red Cross, and the jurisprudence of the international courts and special tribunals that have been constituted by international agreement.

⁹⁸ See Chapter 1 for more details.

⁹⁹ See Chapter 2 for more details.

¹⁰⁰ See Chapter 1 for details.

Islamic law – A system of civil and penal laws that is predominantly based on *Shari'a*, with a body of interpretation and jurisprudence that may be informed by local experience.

Justiciable – Subject to due process in a court of law.

Juvenile justice – A special dimension of the justice system which recognises the needs and rights of children who may come into conflict with the law.

Law – With regard to human society, the body of rules, regulations and prohibitions, developed through custom, or adopted and promulgated by the government, which guide the conduct of individuals, organisations and the government in relation to others with whom the political, civic, economic and social environment is shared.

Law reform commissions – Permanent standing bodies used in some countries to review existing legislation and make recommendations on new measures or revision of existing legislation in order to bring the expression of law up to current standards.

Legal illiteracy – Lack of knowledge of laws or of the legislative process.

Legal reform – Reform of the legal system, including the judiciary, police and custodial institutions.

Legal system – Encompasses all the rules and institutions, based on its legal tradition, which determine how the law is applied.¹⁰¹

Legal tradition – The cultural perspective under which the legal system is created, providing the philosophy for how the system should be organised and how law should be formed and implemented.¹⁰²

Legislation – All acts of the legislature, including formal laws, government action plans, budgets, and administrative measures.

¹⁰¹ See Chapter 2 for more details.

¹⁰² See Chapter 2 for more details.

Legislative reform – Reform of the whole body of legislation, including Constitutional laws, acts of the legislature, formal laws, decrees and administrative measures as well as legal institutions.

Local or domestic law – Law that is adopted by and prevails within a specific country, as opposed to international law. (See above).

Mainstreaming – Applying programmes or approaches which have been tried and tested in a small representative region to the entire country.

Micronutrient malnutrition – Caused by the lack of essential micronutrients (such as iodine, iron, folic acid, or vitamins A or D) in the diet, resulting in developmental deficits or vulnerability to particular ailments.

Minority group – Any group which, by virtue of its ethnic composition, place of origin, traditional practices, or language or culture is marginalized in society and effectively deprived of rights; the term may also be applied more generally to groups which, although not a numerical minority in society, are nevertheless treated by law or custom as if they were less significant than others, as women are in many countries.

Mixed systems – Legal systems which involve combinations of more than one legal tradition often involving some form of customary or traditional law or Islamic law combined with civil or common law.¹⁰³ (Contrast to **Homogeneous systems**, above).

Monist system – A system in which national and international law are viewed as a single legal system, and international treaties, once ratified or acceded to, automatically become part of national law.

Non-discrimination – One of the fundamental principles of human rights, which prohibits and condemns any distinction, exclusion, restriction or preference based on grounds such as “race, colour, sex,

¹⁰³ See Chapter 2 for more details.

language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.’ (CRC, Article 2.1).

Non-refoulement – A principle of customary international law which opposes any measure attributable to the State which could have the effect of returning an asylum seeker or refugee to the frontiers of territories where his or her life or freedom would be threatened, or where he or she is at risk of persecution, including interception, rejection at the frontier, or indirect *refoulement*.¹⁰⁴

Penal reform – Reform of the penal system (i.e. court system, prisons, and other penal institutions).

Personal law – Law which relates to the status of persons, in particular regarding adoption, marriage, divorce, burial, and devolution of property on death in some constitutional regimes.

Plural systems – see **Mixed systems** (above).

Positive discrimination – See **Affirmative action** (above); this term is not generally used in contemporary discussion.

Reflection delay – A mechanism instituted by some States as a middle ground between respect for the rights of victims of trafficking and States’ need to arrest and prosecute traffickers, to ensure that victims can recover from their trauma, have access to support and assistance including medical care and legal advice, and can thus make an informed decision about whether they want to testify against the trafficker.

Rule of law – A principle according to which laws have the ultimate authority over the actions of all individuals (including government representatives). Government authority is exercised only in accordance with publicly disclosed laws and regulations, and is subject to the normal checks of an independent judiciary.

¹⁰⁴ Global Consultations on International Protection, Cambridge Roundtable, 9- 10 July 2001, organised by the United Nations High Commissioner for Refugees and the Lauterpacht Research Centre for International Law, *Summary Conclusions - The Principle of Non-Refoulement*.

Self-executing – Of international treaties and conventions, becoming part of domestic law as a consequence of ratification or accession (in monist systems).

Statutes – Laws enacted by the legislature, subject to judicial review and interpretation.

Supremacy clauses – Constitutional provisions which affirm the supremacy of the Constitution over all other legislation or regulations.

System of presumption – In criminal law, if certain conditions are gathered, even if there is no substantial evidence against a particular person, that person is presumed guilty.

Traditional law – See **Customary law**, above.